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No. 48

In the Supreme Court of the United States

October Term, 1947

WILLIAM SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

FILED FOR THE UNITED STATES

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Constitutional provision and statutes and regulation involved.....	2
Statement.....	3
Summary of argument.....	6
Argument.....	9

I. The business records which petitioner was compelled to produce were required to be kept by a lawful regulation promulgated by the Price Administrator; petitioner's constitutional privilege against self-incrimination did not, therefore, entitle him to withhold such records.....

11

II. Since constitutional privilege and statutory immunity are correlative, petitioner obtained no immunity under Section 202 (g) in exchange for producing these records.....

21

III. In any event, even if petitioner obtained such immunity, it did not bar the present prosecution, in view of the remoteness of the information contained in the records to the offenses with which petitioner was here charged.....

39

Conclusion.....

42

Appendix.....

43

CITATIONS

Cases:

<i>Albert v. Milk Control Board</i> , 210 Ind. 283, 200 N. E. 688.....	19
<i>Amato v. Porier</i> , 157 F. 2d 719, certiorari denied, 329 U. S. 812.....	20, 26
<i>Aston v. State</i> , 27 Tex. App. 574, 11 S. W. 637.....	19
<i>Baltimore and Ohio R. R. v. Int. Com. Comm.</i> , 221 U. S. 612.....	22
<i>Bartlett Frasier Co. v. Hyde</i> , 65 F. 2d 350, certiorari denied, 290 U. S. 654.....	18
<i>Bowles v. Beatrice Creamery Co.</i> , 146 F. 2d 774.....	13, 14, 20
<i>Bowles v. Chew</i> , 53 F. Supp. 787.....	20
<i>Bowles v. Glick Bros. Lumber Co.</i> , 146 F. 2d 566, certiorari denied, 325 U. S. 877.....	13, 20
<i>Bowles v. Insel</i> , 148 F. 2d 91.....	13, 20
<i>Bowles v. Miele</i> , 64 F. Supp. 835.....	20

(1)

II

Cases—Continued

	Page
<i>Bowles v. Sachnoff</i> , 65 F. Supp. 538.....	20
<i>Brutus v. Seils</i> , 62 F. Supp. 773.....	20
<i>Boyd v. United States</i> , 116 U. S. 616.....	15, 16
<i>Bradshaw v. Murphy</i> , 7 C. & P. 612.....	15
<i>Brown v. Walby</i> , 161 U. S. 591.....	29
<i>Church of the Holy Trinity v. United States</i> , 143 U. S. 457.....	36
<i>Coleman v. United States</i> , 153 F. 2d 400.....	13, 20
<i>Counselman v. Hitchcock</i> , 142 U. S. 547.....	31
<i>Cudmore v. Bowles</i> , 145 F. 2d 697, certiorari denied, 324 U. S. 841.....	20
<i>Culper v. Smith</i> , 74 S. W. 2d 754.....	19
<i>Davis, State ex rel. v. Ross</i> , 97 Fla. 710, 122 So. 225.....	19
<i>Davis v. United States</i> , 328 U. S. 582.....	15, 18
<i>Dunham v. Ottinger</i> , 243 N. Y. 423, 154 N. E. 298, error dismissed, 276 U. S. 592.....	19
<i>Esqes Co. v. United States</i> , 262 U. S. 151.....	15
<i>Financial Aid Corp. v. Wallace</i> , 23 N. E. 2d 472.....	19
<i>Glickstein v. United States</i> , 222 U. S. 139.....	35
<i>Goulet v. United States</i> , 255 U. S. 298.....	18
<i>Grant v. United States</i> , 227 U. S. 74.....	15
<i>Hagen v. Porter</i> , 156 F. 2d 362, certiorari denied, 329 U. S. 729.....	20
<i>Hale v. Henkel</i> , 201 U. S. 43.....	15, 22
<i>Heike v. United States</i> , 227 U. S. 131.....	7, 9, 22, 23, 24, 25; 26, 28, 31, 32, 33, 39, 41
<i>Hughes v. State</i> , 67 Tex. Crim. R. 333, 149 S. W. 173.....	19
<i>Kraus & Bros. v. United States</i> , 327 U. S. 614.....	3
<i>Loe, G. H., Inc. v. Fleming</i> , 161 F. 2d 726.....	38
<i>Markham v. Cabell</i> , 326 U. S. 404.....	21
<i>Mason v. United States</i> , 244 U. S. 362.....	41
<i>Oklahoma Press Publ. Co. v. Walling</i> , 327 U. S. 186.....	22
<i>Parks v. Lauren's Cotton Mills</i> , 75 S. C. 560, 56 S. E. 234.....	19
<i>People v. Coombs</i> , 158 N. Y. 532.....	15
<i>People v. Creden</i> , 281 N. Y. 413, 24 N. E. 2d 105.....	19
<i>People v. Henwood</i> , 123 Mich. 317, 82 N. W. 70.....	18
<i>People v. Rosenheimer</i> , 209 N. Y. 115, 102 N. E. 530.....	19
<i>People v. Schneider</i> , 139 Mich. 673, 103 N. W. 172.....	19
<i>Peters v. United States</i> , No. 256, this Term.....	32
<i>Porter v. Mueller</i> , 156 F. 2d 278.....	20
<i>Porter v. Wright</i> , 69 F. Supp. 46.....	26
<i>Reises Warehouse Corp. v. Commonwealth</i> , 141 Va. 194, 126 S. E. 87.....	19
<i>Rodgers v. United States</i> , 138 F. 2d 992.....	18
<i>Ryan v. Amazon Petroleum Corp.</i> , 71 F. 2d 1, reversed, 293 U. S. 388.....	18
<i>St. Joseph, City of, v. Levin</i> , 128 Mo. 788, 31 S. W. 101.....	17, 19
<i>Spring, C. M., Drug Co. v. United States</i> , 12 F. 2d 852.....	18
<i>State v. Bennett</i> , 315 Mo. 1267.....	19
<i>State v. Davis</i> , 68 W. Va. 142, 68 S. E. 639.....	19

III

Cases—Continued

	Page
<i>State v. Davis</i> , 108 Mo. 666, 18 S. W. 894.....	18
<i>State v. Donovan</i> , 10 N. D. 203, 86 N. W. 709.....	17, 18
<i>State v. Hall</i> , 164 Tenn. 548, 51 S. W. 2d 851.....	19
<i>State v. Legora</i> , 162 Tenn. 122, 34 S. W. 2d 1056.....	19
<i>State v. Stein</i> , 215 Minn. 308, 9 N. W. 2d 763.....	19
<i>State v. Walker</i> , 34 N. M. 405, 281 P. 481.....	19
<i>United States v. Armour & Co.</i> , 142 Fed. 808.....	22, 32
<i>United States v. Armour & Co.</i> , 64 F. Supp. 855.....	37
<i>United States v. Darby</i> , 312 U. S. 100.....	13, 18
<i>United States v. George F. Fish, Inc.</i> , 154 F. 2d 798, certiorari denied, 328 U. S. 869.....	3
<i>United States v. Hoffman</i> , No. 97, this Term.....	9,
10, 21, 26, 29, 30, 34, 39	39
<i>United States v. Katz</i> , 271 U. S. 354.....	36
<i>United States v. Kempe</i> , 59 F. Supp. 905, reversed, 151 F. 2d 680.....	20
<i>United States v. Monia</i> , 317 U. S. 424.....	14, 22, 29, 31, 32
<i>United States v. Mulligan</i> , 268 Fed. 893.....	17, 18
<i>United States v. Weinberg</i> , 65 F. 2d 394.....	41
<i>United States v. White</i> , 322 U. S. 694.....	14, 15, 22
<i>Wheeler v. United States</i> , 226 U. S. 478.....	15
<i>Wilson v. United States</i> , 221 U. S. 361.....	6, 15, 16, 17, 22, 34, 37
<i>Zap v. United States</i> , 328 U. S. 624, reversed on other grounds on rehearing, 330 U. S. 800.....	18

Constitution:

Fifth Amendment.....	16, 43
----------------------	--------

Statutes and Regulation:

Act of July 31, 1789, 1 Stat. 29.....	16
Act of February 25, 1868, 15 Stat. 32, R. S. 860.....	31
Act of February 25, 1903, 32 Stat. 904, 15 U. S. C. 32.....	23
Act of June 30, 1906, 34 Stat. 798.....	22, 32
Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. 46a.....	9, 27, 33, 34, 40, 45
Emergency Price Control Act of 1942, 56 Stat. 23, Sec. 202, as amended, 50 U. S. C. App., Supp. V, 922.....	11,
27, 28, 29, 30, 34, 36, 43	43
Maximum Price Regulation 426, issued July 10, 1943, 8 Fed. Reg. 9546:	

Reg. 9546:

Sec. 11.....	3, 46
Sec. 14.....	11, 12, 47

Miscellaneous:

30 A. L. R. 1436.....	19
Hearings on H. R. 5990 before the Committee on Banking and Currency, United States Senate, 77th Cong., 1st sess., pp. 192-194.....	12
H. Rep. No. 1409, 77th Cong., 1st sess., p. 9.....	28
H. Rep. No. 1698, 78th Cong., 2d sess.....	43
S. Rep. No. 931, 77th Cong., 2d sess., p. 21.....	28
8 Wigmore Evidence, 3d ed., Secs. 2250 et seq., 2259c. pp. 348-351.....	14, 15, 18

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No. 49

WILLIAM SHAPIRO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 122-127) is reported at 159 F. 2d 890.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 7, 1947 (R. 128). The petition for a writ of certiorari was filed on March 5, 1947, and was granted on June 2, 1947 (R. 128). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

(1)

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioner, in obedience to an administrative subpoena, produced business records which he had kept as required by a regulation promulgated by the Price Administrator. In this prosecution for violation of the Emergency Price Control Act, he interposed a plea in bar, claiming that under Section 202 (g) of the Act, which substantially incorporates the provisions of the Compulsory Testimony Act of 1893, his production of these records gave him immunity from prosecution. This plea was overruled by the trial court, which was affirmed by the court below.

Two questions are presented:

1. Was petitioner entitled, because of his constitutional privilege against self-incrimination, to withhold these records, and hence did he obtain statutory immunity from prosecution by being compelled to produce them?

2. If so, does such immunity extend to the present prosecution, in view of the remoteness of the information contained in the records to the offenses with which petitioner was here charged?

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Fifth Amendment, the Emergency Price Control Act, the Compulsory Testimony Act, and Maximum Price Reg-

ulation 426 are set forth in the Appendix, pp. 43-47.

STATEMENT

Petitioner is engaged in the wholesale fruit and vegetable business in New York City (R. 63). During 1943 and 1944, he was subject to the terms of Maximum Price Regulation 426, which fixed ceiling prices on sales of fruits and vegetables at wholesale. On December 18, 1945, he was convicted in the United States District Court for the Southern District of New York on counts 7, 8, 9, 10, and 11 of a 48-count information which charged him with failure to comply with the regulation in violation of the Emergency Price Control Act (R. 2-31, 40). He was sentenced to pay a fine of \$1,000 on each count (R. 40). Each of the counts on which he was convicted alleged that at a specified time during the period from August through November 1943, petitioner made tie-in sales of fruits and vegetables to one Ernest Davino, requiring the latter to buy a commodity which he did not want as a condition to purchase of the desired product (R. 5-8).¹

Before trial, petitioner interposed a plea in bar, claiming immunity from prosecution by virtue of Section 202 (g) of the Emergency Price

¹ Section 11 of the regulation specifically forbade evasion through the device of tie-in sales. (see *infra*, p. 47). Cf. *Kraus & Bros. v. United States*, 327 U. S. 614, with *United States v. George F. Fish, Inc.*, 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869.

4

Control Act, which substantially incorporates the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (*infra*, pp. 45-46) (R. 32-39). This plea was overruled by the trial court (R. 40), and the Circuit Court of Appeals for the Second Circuit affirmed (R. 128).

It appears from the plea in bar and the exhibits attached to it (and the allegations therein have not been denied by the Government) that on September 29, 1944, petitioner was served with a *subpoena duces tecum* and *ad testificandum* issued by the Price Administrator directing him to appear before certain named enforcement officials of the O. P. A. to testify concerning "all purchases and sales of fresh fruit and vegetables from September 1, 1944 to September 28, 1944" and requiring that he produce at the same time and place "all duplicate sales invoices, sale books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1, 1944 to September 28, 1944" (R. 35). In compliance with the subpoena petitioner appeared before the designated officials on October 4, 1944. He was sworn and requested to turn over the subpoenaed books and records. Upon inquiry from petitioner's counsel whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records," the presiding official stated that the "witness is entitled to whatever immunity which

flows as a matter of law from the production of these books and records which are required to be kept pursuant to M. P. R.'s 271 and 426" (R. 37). Petitioner then made a formal statement for the record in which he claimed "my constitutional privilege," and immunity under the Emergency Price Control Act and the Compulsory Testimony Act of February 11, 1893 (R. 37). He thereupon opened the books and records in question to examination by officials of the Office of Price Administration (R. 37-38).

The plea in bar alleged in respect of counts 7 through 11 that the name of Ernest Davino, the purchaser in the transactions involved in those counts, appeared on the subpoenaed books and records in several instances (R. 34; see also, R. 38-39). In showing the connection between the September 1944 sales records and the offenses in 1943, petitioner alleged that "the Office of Price Administration used the evidence concerning the transactions respecting which I was immune from prosecution in obtaining the names and other leads and in preparing and searching out each and every evidence against me, and the United States Attorney in filing the information used the evidence so prepared and secured, as well as the leads therefrom" (R. 34).

In affirming the judgment of conviction, the Circuit Court of Appeals for the Second Circuit held that the constitutional privilege against self-

incrimination does not extend to records required by law to be kept, and that the statutory immunity granted by Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 does not extend to one who has been compelled to produce records falling outside the scope of the constitutional privilege (R. 122-127).

SUMMARY OF ARGUMENT

1. That petitioner was required by Maximum Price Regulation 426 to preserve for examination appropriate records showing the prices he charged for commodities subject to the regulation, and that the record-keeping requirement of the regulation was lawful, are not in dispute.

The sales records which petitioner produced in obedience to the administrative subpoena were records which the regulation required him to keep. Such records, it is settled, are within the category of public papers, i. e., papers in which the public's interest extends beyond utilizing them as evidence in a particular case; they are therefore not constitutionally protected from disclosure to the appropriate governmental agency. The privilege against self-incrimination which applies to private documents does not extend to such public papers and records. *Wilson v. United States*, 221 U. S. 361, 380-382.

2. The question whether statutory immunity extends to one who discloses information which is not protected by the privilege against self-

incrimination would appear to have been settled by *Heike v. United States*, 227 U. S. 131. In that case, this Court rejected the contention that the immunity granted by statute is broader than the privilege of the Fifth Amendment. Mr. Justice Holmes' opinion for the Court, stated that the immunity statute "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned." For "the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got," not to offer "a gratuity to crime" 227 U. S. at 142.

Clearly, therefore, petitioner obtained no immunity in exchange for the production of these records, which were required by law to be kept. For, like the corporate records involved in the *Heike* case, they are outside the constitutional privilege. Congress was under no obligation to grant immunity in order to obtain access to them; and there is no basis either in its language or legislative history for the inference that Section 202 (g) of the Price Control Act was intended to grant immunity where the information was not protected from disclosure by the constitutional privilege.

To suggest that Congress gratuitously conferred immunity in exchange for the disclosure of records which were required to be kept is to urge that Congress first granted the Adminis-

trator power to require appropriate records to be kept as a means for enforcing the statute and for uncovering violations, and that it then denied him access to the records unless immunity was granted for the offenses which they disclosed. The policy of the Act clearly is to exchange immunity for the privilege against self-incrimination only where the Constitution would otherwise stay the Administrator's hand in seeking information essential to the successful administration of the Act. So construed, the statute grants immunity to a person who gives incriminating oral testimony or produces documents which are privileged. It does not gratuitously extend immunity in exchange for the production of records required by law to be kept.

3. The sales records which petitioner was required to produce were for the month of September 1944. The offenses for which petitioner was convicted occurred in the fall of 1943. Petitioner's claim to immunity rests on the allegation—not disputed by the Government—that the records gave the Government a lead which eventually resulted in the discovery of the 1943 offenses. Petitioner points out that the disclosed records showed that one D'Avino was a customer of petitioner's in September 1944, and that the transactions for which he was convicted involved sales to D'Avino in 1943.

Assuming that petitioner is otherwise entitled to immunity, he has failed to show that the information he disclosed bore a substantial relation to the offenses for which he is here being prosecuted. The Compulsory Testimony Act (*infra*, p. 45) provides that "no person shall be prosecuted * * * for or on account of any transaction, matter or thing, concerning which" he produced evidence. "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike v. United States*, 227 U. S. 131, 144. The 1944 sales records did not reveal the 1943 offenses or any ingredient of them. The fact that D'Avino did business with petitioner was information of easy knowledge which was not incriminating, which was not private or secret in nature, and which was only remotely related to the offenses of which petitioner has been convicted.

ARGUMENT

The principal question involved in this case and in its companion on appeal, *United States v. Hoffman*, No. 97, is whether statutory immunity from prosecution extends to one who is compelled to produce for inspection business records which

are required by law to be kept." The Circuit Court of Appeals for the Second Circuit, in rejecting petitioner's claim to immunity, held that such records are not privileged from disclosure, and that statutory immunity is extended only in exchange for relinquishment of a constitutional privilege (R. 124-127). The district court in the *Hoffman* case reached a contrary conclusion on the ground that Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 extend immunity to "any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records," apparently without regard to whether the records are protected by the privilege against self-incrimination (No. 97, R. 29-30).

We submit that Congress clearly has power to require records to be kept as an aid to the administration and enforcement of its regulatory legislation, and that such records are public in nature and, unlike purely private records, are not protected by the privilege against self-incrimination. The immunity which is extended

¹ There is no oral testimony involved in either case. We assume, *arguendo*, as did the court below (see R. 127), that the information disclosed by petitioner in response to the subpoena substantially concerns the offenses for which petitioner was convicted. But see Part III of the Argument, *infra*, pp. 39-42, where it is argued that, in fact, there is no such substantial connection.

by statute is granted only as a *quid pro quo* for information which is privileged from disclosure, and not as a gratuity to one who has no privilege to assert.

I.

THE BUSINESS RECORDS WHICH PETITIONER WAS COMPELLED TO PRODUCE WERE REQUIRED TO BE KEPT BY A LAWFUL REGULATION PROMULGATED BY THE PRICE ADMINISTRATOR; PETITIONER'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION DID NOT, THEREFORE, ENTITLE HIM TO WITHHOLD SUCH RECORDS .

A. Section 202 (b) of the Act empowers the Administrator, "by regulation or order, to require any person who is engaged in the business of dealing with any commodity * * * to make and keep records and other documents," to make reports and to permit inspection of such records. Pursuant to this authority the Administrator, in Maximum Price Regulation 426, effective July 20, 1943, 8 Fed. Reg. 9546 (*infra*, p. 46), required a person selling fresh fruits and vegetables for which maximum prices were established by the regulation to (1) preserve for examination his records, "including invoices, sales tickets, cash receipts, or other written evidence of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation," and (2) keep and make available for examination "records of the same kind as he has

customarily kept, relating to the prices which he charges for fresh fruits and vegetables."

§ 1439.3, Section 14 (a) and (b), *infra*, p. 47.

The records called for by the subpoena and produced by petitioner were his records "relating to the sale of all commodities from September 1, 1944 to September 28, 1944" (R. 35, 37-38).

Hence, they clearly were required by the regulation to be kept and to be opened for inspection by the Office of Price Administration.

We do not understand petitioner to challenge the record-keeping requirements of the Act and regulation, and, indeed, there could be no basis for such a challenge. For the object of Congress in authorizing the Administrator to require that appropriate sales records be kept and available for inspection was two-fold: to uncover violations of the law, and to facilitate the administration and enforcement of the Emergency Price Control Act. Such records furnish concrete and specific information as to the actual operation of the statute and regulations; they show the Administrator whether a regulation is, in practice, achieving its purpose; and they give him an informed basis for future action.* Moreover, the task of en-

* A detailed statement of the importance of the record-keeping provision is contained in the brief submitted by the General Counsel of the Office of Price Administration and Civilian Supply to the Senate Committee considering the proposed price control legislation. Hearings on H. R. 5990 before the Committee on Banking and Currency, United States Senate, 77th Cong., 1st sess., pp. 192-194.

forcement is greatly facilitated by requiring sales records to be kept. The mere necessity for keeping records tends to discourage sales at prices in excess of those fixed by law. The availability of sales records likewise enabled the Administrator to ferret out those sellers who were unwilling to abide by the regulation, and to institute enforcement measures which would cleanse the market place of such persons and thus aid other sellers to do business in a lawful manner. This is an appropriate means to a lawful end. *United States v. Darby*, 312 U. S. 100, 125, and cases cited; *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774, 779 (C. C. A. 10); *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, 570-571 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Bowles v. Insel*, 148 F. 2d 91, 93 (C. C. A. 3).

It is significant that the record-keeping requirement here is limited to information bearing on the prices at which regulated commodities are sold. Petitioner was not required to keep records of his private affairs or even of his other business activities. His sole duty was to keep and make available for inspection records relating to the prices at which he sold price-controlled fruits and vegetables. By statute and regulation, petitioner knew in advance that if he sold fruits and vegetables for which maximum prices were fixed by the Administrator, he was obligated to keep appropriate sales records. See *Coleman v. United*

States, 153 F. 2d 400 (C. C. A. 6); *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774 (C. C. A. 10). Petitioner recognized his duty, for he kept the required records and, when called upon, made them available to the Administrator.

B. We turn, now, to consideration of the major premise of petitioner's argument, namely, that his constitutional privilege against self-incrimination applied to the records which he was compelled to produce. By way of preface, some general observations on the scope of the constitutional privilege are appropriate. As has been stated by Mr. Justice Frankfurter: "Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, 'the public has a right to every man's evidence.'" *United States v. Monia*, 317 U. S. 424, 432–433 (dissent). Professor Wigmore's survey of the origin and development of the privilege shows that it had no place in the common law prior to the middle of the 18th-century, and that it was merely a qualification upon the duty to give testimony. 8 Wigmore, *Evidence* (3rd ed.) §§ 2250 *et seq.* And recent decisions of this Court, particularly, have emphasized that the privilege, embedded as it is in the Fifth Amendment, is essentially an expression of the law's protection of the individual's right of privacy. See *United States v. White*, 322 U. S. 694, 700;

Davis v. United States, 328 U. S. 582, 589-590. In the latter case, for example, Mr. Justice Frankfurter referred to the constitutional protection of "the right to be let alone except under responsible judicial compulsion," 328 U. S. at 596 (dissent).

For these reasons, therefore, the Fifth Amendment has never been held to justify refusal to produce papers other than those purely private and personal in character. Thus, corporate records are not protected by the privilege, *Wilson v. United States*, 221 U. S. 361; *Hale v. Henkel*, 201 U. S. 43, even where they are in the custody of a corporation officer who asserts the privilege in his own behalf. *Wheeler v. United States*, 226 U. S. 478; *Essgee Co. v. United States*, 262 U. S. 151; *Wilson v. United States*, *supra*; *Grant v. United States*, 227 U. S. 74. This applies equally to unincorporated labor unions. *United States v. White*, 322 U. S. 694. Moreover, there is the clear line of authority holding that individuals cannot, on grounds of constitutional privilege, refuse production of incriminating public records in their custody. *Wilson v. United States*, 221 U. S. at 380-382, and authorities there cited; *People v. Coombs*, 158 N. Y. 532; *Bradshaw v. Murphy*, 7 C. & P. 612; 8 Wigmore, *Evidence* (3rd ed.) § 2259c.

In *Boyd v. United States*, 116 U. S. 616, decided more than sixty years ago, this Court recognized the distinction between "a search for and seizure

of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him"—which is prohibited by the Fourth and Fifth Amendments—and an examination by government agencies and officers of "the entries [of the manufacture or custody of excisable articles] in books required by law to be kept for their inspection"—which is not prohibited (116 U. S. at 623-624).⁴ And the later case of *Wilson v. United States*, 221 U. S. 361, 380-382, removed any doubts on this score. The *Wilson* case held that an officer of a corporation was not privileged against the

⁴ As the Court noted in the *Boyd* case, 116 U. S. at 623, the same Congress which proposed the original amendments to the Constitution provided in the Act of July 31, 1789, 1 Stat. 29—"An act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States"—that "the master of every vessel putting into a port of the United States from a foreign port shall deliver, upon demand, to any authorized officer described records concerning the passengers, cargo, and destination of the vessel. These records, in turn, were required to be entered in the books of the collector of revenue. Section 9 of the Act imposed a duty on the revenue officials to keep appropriate records and to open them for proper inspection. The books which the act required to be kept for inspection were thus books required to be kept by a public officer, but they included records made by the masters of the various ships.

The statute illustrates the practice, even as early as 1789, of requiring records to be kept both by persons engaged in activities subject to regulation and by public officers, and its enactment by the same Congress which proposed the Fifth Amendment supports the settled doctrine of the *Wilson* case, that the Fifth Amendment does not extend to such records.

production of corporate records in his possession, even though they might incriminate him. But in reaching this decision the Court relied heavily upon a doctrine that it regarded as well settled in the law. With abundant illustrations from the decided cases, both English and American, Mr. Justice Hughes, speaking for the Court, pointed out that the Fifth Amendment does not enable the custodian of records required to be kept by law to withhold them, even though they may incriminate him. The opinion stated (221 U. S. at 380):

The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

Familiar illustrations of the principle are not hard to find. Thus, a druggist's records of his sales of liquor for "medicinal" purposes, *State v. Donovan*, 10 N. Dak. 203, or a pawnbroker's records of pledges, *St. Joseph v. Levin*, 128 Mo. 588, or the records of a licensed food dealer, *United States v. Mulligan*, 268 Fed. 893 (N. D. N. Y.), have been held outside the protection of the privilege. And never since the *Wilson* case has it been doubted that the Fifth Amendment does not insulate re-

quired records from being produced in obedience to a subpoena or other lawful order issued by the appropriate governmental body. See *Davis v. United States*, 328 U. S. 582, 589-590, 593, 595-596, 602; *Zap v. United States*, 328 U. S. 624, 628, reversed on other grounds on rehearing, 330 U. S. 800; 8 Wigmore, *Evidence*, 3rd ed., Sec. 2259c, pp. 348-351; cf. *Gouled v. United States*, 255 U. S. 298, 308-309. Congress time and again has legislated on this assumption and has provided for the keeping and inspection of records, as in the Emergency Price Control Act. See the illustrative statutes collected in the opinion of the court below (R. 124); and see, e. g., *United States v. Darby*, 312 U. S. 100, 124-125 (Fair Labor Standards Act); *Rodgers v. United States*, 138 F. 2d 992 (C. C. A. 6) (Agricultural Adjustment Act); *C. M. Spring Drug Co. v. United States*, 12 F. 2d 852, 857 (C. C. A. 8) (Harrison Narcotic Law); *Bartlett Frazier Co. v. Hyde*, 65 F. 2d 350, 352 (C. C. A. 7), certiorari denied, 290 U. S. 654 (Grain Futures Act); *United States v. Mulligan*, 268 Fed. 893 (N. D. N. Y.) (Lever Act); *Ryan v. Amazon Petroleum Corp.*, 71 F. 2d 1, 8 (C. C. A. 5), reversed on other grounds, 293 U. S. 388 (National Industrial Recovery Act).¹

¹ Statutes requiring businesses of various sorts to keep records and to submit to inspection of records and premises by designated officials are common to most states and have been consistently approved by the courts. *State v. Davis*, 108 Mo. 668, 18 S. W. 894; *People v. Hemwood*, 128 Mich. 317, 82 N. W. 70; *State v. Donovan*, 10 N. D. 208, 86 N. W. 709;

In dealing with the record-keeping requirement of the Emergency Price Control Act, the lower

State v. Davis, 68 W. Va. 142, 68 S. E. 639 (records of sales of liquor); *Hughes v. State*, 67 Tex. Crim. R. 333, 149 S. W. 173 (records of shipments of liquor); *State v. Legora*, 162 Tenn. 122, 34 S. W. 2d 1056; note at 30 A. L. R. 1436 (records of purchases and sales of scrap metal); *City of St. Joseph v. Levin*, 128 Mo. 788, 31 S. W. 101; *Financial Aid Corp. v. Wallace*, 23 N. E. 2d 472 (Ind.) (records of transactions of pawn brokers); *Aston v. State*, 27 Tex. App. 574, 11 S. W. 637; *State v. Walker*, 34 N. M. 405, 281 P. 481 (records of slaughtered livestock); *Dunham v. Ottinger*, 243 N. Y. 423, 154 N. E. 298, error dismissed, 276 U. S. 592 (inspections by Attorney General, at his discretion, of stock transactions); *Albert v. Milk Control Board*, 210 Ind. 283, 200 N. E. 688 (authorizing the Board to investigate any "facts to enable the Board to administer this act," and, as an incident thereto, to inspect all pertinent books, records, papers, etc.); *State v. Stein*, 215 Minn. 308, 9 N. W. 2d 763 (records of purchases of raw fur). See also *State ex rel. Davis v. Rose*, 97 Fla. 710, 122 So. 225. (records to be kept by real estate brokers); *Parks v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234 (cotton buyers); *Reaves Warehouse Corp. v. Commonwealth*, 141 Va. 194, 126 S. E. 87 (tobacco warehouses); and *Culver v. Smith*, 74 S. W. 2d 754 (Tex. Civ. App.), upholding the authority of a state commission to examine the books and records of all companies engaged in the petroleum industry, and in so doing, pointing to the distinction between private papers and those of a business which is being regulated by the government.

For related cases, see, as to requirements of operators of motor vehicles in case of accident, *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530; displaying licenses on motor vehicles, *People v. Schneider*, 139 Mich. 673, 103 N. W. 172; records in connection with regulation of hours an operator of a motor truck or bus may be on duty, *People v. Creeden*, 281 N. Y. 413, 24 N. E. 2d 105; game warden inspection of kill or catch of fish, *State v. Hall*, 164 Tenn. 548, 51 S. W. 2d 851, and *State v. Bennett*, 315 Mo. 1267.

federal courts have recognized its validity and utility and, where necessary, have come to the aid of the Administrator in enforcing it. *Cudmore v. Bowles*, 145 F. 2d 697, 698-699 (App. D. C.), certiorari denied, 324 U. S. 841; *Porter v. Mueller*, 156 F. 2d 278, 279-281 (C. C. A. 3); *Bowles v. Insel*, 148 F. 2d 91, 93 (C. C. A. 3); *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, 570-571 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Hagen v. Porter*, 156 F. 2d 362, 367 (C. C. A. 9), certiorari denied, 329 U. S. 729; *Amato v. Porter*, 157 F. 2d 719, 721 (C. C. A. 10), certiorari denied, 329 U. S. 812; *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774 (C. C. A. 10).^{*} See also, *Coleman v. United States*, 153 F. 2d 400, 403 (C. C. A. 6).

The case is thus one of a seller who furnished no oral testimony and who was required to and did furnish for inspection only sales records required by appropriate regulation to be kept.⁷

^{*} Among the various decisions of the district courts, see, particularly, *United States v. Kempe*, 59 F. Supp. 905, 908-910 (N. D. Iowa); reversed on another ground, 151 F. 2d 680 (C. C. A. 8); *Bowles v. Chew*, 53 F. Supp. 787 (N. D. Calif.); *Bowles v. Misle*, 64 F. Supp. 835 (D. Neb.); *Bowles v. Seitz*, 62 F. Supp. 773 (W. D. Tenn.); *Bowles v. Sachnoff*, 65 F. Supp. 538 (W. D. Pa.).

⁷ The weakness of petitioner's argument would be even more clearly demonstrated if, as is conventional under many types of federal and state regulation, he had been required by law to forward periodic reports to the Administrator as to his sales, customers' names and addresses, etc. His argument here would logically drive petitioner to the obviously

The records, it is plain, are not private papers and hence are not protected by the Fifth Amendment. The question which remains is whether petitioner is entitled to statutory immunity from prosecution for disclosing record which he had no constitutional right not to disclose.

II

SINCE CONSTITUTIONAL PRIVILEGE AND STATUTORY IMMUNITY ARE CORRELATIVE, PETITIONER OBTAINED NO IMMUNITY UNDER SECTION 202 (G) IN EXCHANGE FOR PRODUCING THESE RECORDS

The question whether statutory immunity extends to the compelled disclosure of unprivileged information is one which is common to the many immunity provisions in the federal laws. It is a question which must be resolved not only by looking to the words of the statute, as Judge Holtzoff did in the *Hoffman* case, but also by viewing the immunity provisions in the context of their constitutional background. For the constitutional privilege is the very subject of the immunity statutes. The "policy as well as the letter of the law is a guide to decision." *Markham v. Cabell*, 326 U. S. 404, 409.

untenable contention that such reports could also not be utilized by the Administrator without clothing petitioner with an immunity from prosecution for offenses disclosed by the reports. Regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated.

If a public official may obtain statutory immunity for disclosing public records in response to a subpoena,⁹ then petitioner, too, is entitled to such immunity. If prior to the Act of June 30, 1906,¹⁰ 34 Stat. 798, a corporation was entitled to immunity for producing corporate records,¹¹ or if an officer of a corporation is entitled to such immunity for producing incriminating corporate records,¹² the same immunity is due petitioner. If in other like situations a person may obtain immunity for disclosing information, in response to a subpoena, which he has no right not to disclose, petitioner, too, is entitled to such a gratuity. But if, as this Court has held, "the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got" (*Heike v. United States*, 227 U. S. 131, 142), it

⁹ See *Wilson v. United States*, 221 U. S. 361, 380.

¹⁰ The 1906 Act made explicit what was implicit in the then existing immunity provisions. Since corporations are not protected by the privilege against incrimination (*Wilson v. United States*, 221 U. S. 361, 372-374), the 1906 Act, in declaring the Congressional purpose in the earlier statutes (see Mr. Justice Frankfurter dissenting in *United States v. Monia*, 317 U. S. 424, 437-438) specifically provided that immunity should extend "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

¹¹ See *Hale v. Henkel*, 201 U. S. 43, 69; *United States v. Armour & Co.*, 142 Fed. 808, 817 (N. D. Ill.).

¹² See *Wilson v. United States*, *supra*, at pp. 384-385; *Baltimore and Ohio R. R. v. Int. Com. Comm.*, 221 U. S. 612, 622-623; *Oklahoma Press Publ. Co. v. Walling*, 327 U. S. 186, 205, 208; *United States v. White*, 322 U. S. 694.

follows that the "gratuity to crime" which petitioner seeks is beyond his reach.

The arguments here closely resemble the contending arguments in the *Heike* case.¹² In that case, the defendant, who had been indicted for frauds on the revenue and conspiracy to commit such frauds, pleaded in bar that he had testified and produced documentary evidence consisting of corporate records in response to a government subpoena in a grand jury investigation of alleged violations of the Sherman Act. He contended that the words of the statute—that no person should be prosecuted for any matter "concerning which he may testify or produce evidence"—were broad enough to give him amnesty from liability for every offense connected in any degree with the matter concerning which he had testified, or at least for every offense toward the discovery of which his testimony led, even if it had no actual effect in bringing about the discovery (227 U. S. at 141). In support of this contention he argued that the immunity statute bore no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege (227 U. S. at 132); and that Congress intended the immunity provision as a reward, permitting some guilty per-

¹² The *Heike* case was concerned with the immunity provision of the Act of February 25, 1903, 32 Stat. 904 (15 U. S. C. 32), rather than the Compulsory Testimony Act of 1893 which is involved in the present case. But this Court stated that both statutes reflect the same policy considerations, 227 U. S. at 142, even though their words are not the same in all respects.

sons to escape in order to secure the evidence desired (227 U. S. at 141). The Government contended, on the other hand, that the statute should be limited by the boundaries of the constitutional privilege.

Rejecting the defendant's argument that the immunity statute was to be construed more broadly than the constitutional privilege, Mr. Justice Holmes, speaking for a unanimous Court, said (227 U. S. at 142):

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not coextensive

with the constitutional privilege.' *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611. Compare act of February 19, 1903, c. 708, § 3, 32 Stat. 847, 848. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, § 2261.

The Court did not deny that the language of the statute, if given a literal construction, was broad enough to reach the information which the defendant disclosed. In a loose sense, the evidence could have been said to "concern" a "transaction, matter, or thing," for which the defendant was prosecuted. And nothing in the statute specifically withdrew statutory immunity from one who under compulsion disclosed corporate records. But applying the statute in the spirit of the constitutional privilege, for which it was designed to be a full exchange, the Court rejected the immunity plea for the reasons "that apart from the statute the petitioner could not have prevented the production of the books or papers of the company, such as the summary was when made, or refused it if he had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a

case"; and that the evidence in the former proceeding "did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it" (227 U. S. at 142-143).

Thus the *Heike* case held that the statute gave immunity only for evidence that was privileged, although the statute itself did not contain any such express limitation. Neither unprivileged corporate records nor evidence which was not incriminating in the constitutional sense were regarded as within the reach of the immunity statute. The same reasoning when applied to this case leads to the result that no immunity is given by the statute for the production of required records. For, like corporate records, they are outside the constitutional privilege. This is the rationale of the decision below and of the decision of the Circuit Court of Appeals for the Tenth Circuit in *Amato v. Porter*, 157 F. 2d 719, certiorari denied, 329 U. S. 812. And it is the view which we urge here.

The contrary view, which was expressed by Judge Holtzoff in *United States v. Hoffman*,¹² No. 97, recognized that to grant immunity in exchange for unprivileged information "would frequently defeat criminal prosecutions and contempt

¹² See also, *Porter v. Wright*, 69 F. Supp. 46, 47-48 (D. Ore.).

proceedings brought to enforce the Emergency Price Control Act and the regulations issued thereunder," but this was justified on the ground that, "If the Congress made the immunity provision so broad as to hamper and perhaps at times frustrate enforcement, Congress alone can provide the remedy" (No. 97, R. 27). While the literal language of the Compulsory Testimony Act "possibly may be so read, reference to the controlling provision in Section 202 (g) of the Emergency Price Control Act demonstrates, we think, that Congress did not make the grant of immunity "so broad."

There is no basis either in its language or legislative history for the inference that Section 202 (g) was intended to grant a broader immunity than the constitutional privilege. Section 202 (*infra*, pp. 43-45) empowers the Administrator to require records to be kept, to make studies and

¹⁴ The Compulsory Testimony Act of February 11, 1893, 27 Stat. 433, 49 U. S. C., provides:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding * * *"

investigations, and to issue subpoenas, and in subsection (g) the statute provides: "

No person shall be excused from complying with any requirements under this section *because of his privilege against self-incrimination*, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, Title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege. [Italics supplied.]

The "obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got" (*Heike v. United States*, 227 U. S. 131, 142). It contemplates that no person

"The Committee Reports (H. Rep. No. 1409, 77th Cong., 1st sess., p. 9; S. Rep. No. 931, 77th Cong., 2d sess., p. 21) explain the evident purpose of Section 202 as follows:

"Section 202 (a) authorizes the Administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations. The power to require by regulation or order the keeping of records and the making of reports is also granted by this subsection.

"Although no person is excused from complying with any requirement of this subsection because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privilege."

shall be able to avoid disclosure because of the protection of the Fifth Amendment. In the manner approved in *Brown v. Walker*, 161 U. S. 591, the statute exchanges immunity for the witness' surrender of his privilege not to incriminate himself. To avail himself of the protection of Section 202 (g), the witness must specifically claim "such privilege"; he shall not be excused from compliance with the requirements of Section 202 of the Act "because of his privilege against self-incrimination." The fundamental assumption of the provision is that the witness possesses a privilege which he must first claim and then relinquish in exchange for statutory immunity.

The *Hoffman* decision fails to meet the language of Section 202 (g). It fails to recognize that the provision incorporates the Compulsory Testimony Act only for the benefit of the person "who specifically claims such privilege."¹⁸ Quite plainly,

¹⁸ The Act thus avoids the question decided in *United States v. Monia*, 317 U. S. 424, whether in the absence of specific statutory language requiring a witness to claim his privilege against self-incrimination, the witness must assert the claim as a condition precedent to the flow of immunity.

There is, in addition, a basic difference here from the *Monia* case. The latter case involved the compulsory production of information which was within the protection of the Fifth Amendment, and the question was whether Congress intended to impose on the witness the responsibility for asserting his privilege or whether it intended the Government to assume the risk that the witness might obtain immunity as a result of testimony which possibly might not have been compelled if it were understood that immunity was

Section 202 (g) does not mean that a person who spuriously claims the privilege is entitled to the benefit conferred by the Compulsory Testimony Act. The privilege which he asserts must be "his." If a witness asserts the privilege with respect to information which is protected from disclosure, he has satisfied the requirement of Section 202 (g) and is entitled to whatever immunity flows from the Compulsory Testimony Act. But if the witness has no privilege to assert, there is no occasion for resort to the Compulsory Testimony Act.

In the present case, petitioner had no privilege not to disclose the records of his sales. Therefore, he could not validly seek to be excused from disclosing his records "because of his privilege against self-incrimination," and, of course, he could not "specifically claim such privilege." He is thus not a person who is entitled to claim immunity under the Compulsory Testimony Act.

But even apart from the specific language of Section 202 (g), the *Hoffman* decision does not, we submit, correctly interpret the Congressional

the price for the testimony. The present case, unlike the *Monia* case, does not involve information which is within the protection of the privilege against self-incrimination. Petitioner had no constitutional right not to disclose the sales records which were subpoenaed. Thus, there are no conflicting policy considerations. The question is simply whether for unexplained reasons Congress conferred immunity on persons like petitioner even though the Constitution did not require it.

purpose which underlies the Compulsory Testimony Act, the provisions of which are incorporated by reference into Section 202. It fails to recognize the plain intent of Congress to give only such immunity as was necessary to obtain information that otherwise "could not be got." *Heike v. United States*, 227 U. S. at 142. The history of the immunity legislation, which is set forth at length in the opinions in *United States v. Monia*, 317 U. S. 424, 427, 429, 431-434," demonstrates that from the first immunity statute in 1857 to the Compulsory Testimony Act of 1893, and thereafter, Congress sparingly granted immunity. In *Counselman v. Hitchcock*, 142 U. S. 547, the Act of February 25, 1868, 15 Stat. 37, R. S. 860, was held unconstitutional because Congress failed to grant full immunity in exchange for compelled testimony. The Compulsory Testimony Act undertook to meet the requirements of *Counselman v. Hitchcock*, *supra*, by providing full immunity in exchange for compelled testimony. "And in 1896 this Court, in *Brown v. Walker*, 161 U. S. 591, 595, found that the 1893 Act 'sufficiently satisfies the constitutional guarantee of protection.' There was no indication of any belief that Congress had given anything more than it had to give—and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution

¹¹ See also the Brief for the United States, pp. 9-29, No. 248, O. T. 1942.

required." *United States v. Monia, supra*, at 434 (dissenting opinion).

A few years later when District Judge Humphrey in *United States v. Armour & Co.*, 142 Fed. 808 (N. D. Ill.), held that the immunity statute was broader than the Constitutional privilege and extended immunity to corporate officers who voluntarily submitted corporate books and records to inspection, Congress, at the request of the President, promptly enacted the Act of June 30, 1906, 34 Stat. 798. The 1906 Act, expressing the Congressional purpose of the immunity statutes of 1893 and 1903, to exchange immunity only for privileged information, restricted the grant of immunity to natural persons who were compelled to give testimony or information under oath." The Act demonstrates that Congress did not intend to give more than the Constitution required. In the words of Mr. Justice Holmes, speaking for the Court in the *Heike* case, 222 U. S. at 142, the legislative purpose requires that the immunity statute involved in that case (as well as the Compulsory Testimony Act) "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned."

* "This question is involved in *Peters v. United States*, No. 256, pending on petition for certiorari, and the Government's Brief in Opposition in that case deals at some length with the history and purposes of the 1906 Act.

The sole object of the immunity legislation was to enable the Government to compel testimony which could not otherwise be obtained because of the privilege. If the information sought from a witness was not privileged, there was no necessity for granting immunity. Nothing in the legislative history of the Compulsory Testimony Act or of the Emergency Price Control Act indicates that Congress intended to reward the disclosure of unprivileged testimony by a grant of immunity. In the absence of clear indications of benevolence on the part of Congress, there is no basis, we submit, for assuming that Congress intended to defeat its very purpose of making administration of the laws more effective by gratuitously immunizing individuals without the desired advantage of securing testimony which the Government would not otherwise have been able to get.

The structure of the Compulsory Testimony Act itself suggests that Congress exchanged immunity for privileged information. "No person shall be excused" from giving incriminating evidence; "But no person shall be prosecuted" for anything concerning which he produces evidence. Freedom from prosecution was the *quid pro quo* for disclosing privileged information.

Many of these considerations were persuasively pressed upon the Court in *Heike v. United States, supra*, as demonstrating that there is "no reason for supposing that the act offered a gratuity to

crime" (227 U. S. at 142). These are also the considerations to which we believe the district court gave insufficient heed in the *Hoffman* case.

There are other considerations as well. In 1942, when the Emergency Price Control Act was enacted, the doctrine that records required by law to be kept are not free from compulsory disclosure was firmly rooted in the law. As we have shown, *supra*, p. 18, it was the regular practice for Congress to empower the various administrative agencies to require the keeping of records which were reasonably necessary to the successful administration of the statutes in question. And the courts, relying on the *Wilson* decision, time and again had held that such records were not private; that the Government was entitled to access to them, for they were public in character. It was with this background that Congress wrote the record-keeping requirements into the Emergency Price Control Act, and in the very same section of the statute adopted the immunity provisions of the Compulsory Testimony Act for the benefit of any person who sought to be excused from furnishing information "because of his privilege against self-incrimination" and "who specifically claims such privilege." The language of Section 202 (g), considered against this background, indicates that, in incorporating by reference the provisions of the Compulsory Testimony Act, Congress understood the later Act not to

grant immunity broader than the constitutional privilege.

To accept petitioner's position means that Congress required records to be kept as a means for securing enforcement of the statute and yet tied the hands of the Administrator in taking enforcement action by granting immunity to every person who was compelled to disclose his required records to the Administrator. In 1942, it was plain that a grant of immunity was not necessary with respect to required records. Nothing in the history of the Price Control Act suggests that those who drafted and enacted it into law thought otherwise.¹⁹ To suggest in these circumstances that Congress gratuitously conferred immunity in exchange for disclosure of records which were required to be kept is to urge that Congress took away with one hand what it granted for a purpose with the other. Nothing in the law requires a court to attribute such an intention to Congress.²⁰ To the contrary, it is

¹⁹ See fn. 3, *supra*, p. 12.

²⁰ Compare *Glickstein v. United States*, 222 U. S. 139, in which it was contended that the immunity provision of subdivision 9 of Section 7 of the Bankruptcy Act of 1898 foreclosed a prosecution for perjury committed by the bankrupt when examined under it. The statute required the bankrupt to "submit to an examination concerning the conducting of his business * * *; but no testimony given by him shall be offered in evidence against him in any criminal proceeding." It was argued that because the provision did not except a prosecution for perjury from the immunity granted, the defendant obtained immunity from prosecution. This

the responsibility of the courts to read the provisions of the act together and to give meaning to each. Unreasonable results are to be avoided, not sought for. *United States v. Katz*, 271 U. S. 354; *Church of the Holy Trinity v. United States*, 143 U. S. 457. Considering the emergency nature of the legislation and the settled state of the law on the question in 1942, Congress intended, we submit, to exchange immunity only for information which otherwise was unavailable. It did not intend to give an invaluable something for nothing, and it did not use language which requires such a bounty.

This does not mean that Congress unnecessarily included an immunity provision in the statute. The Administrator was empowered by Section 202 (a) to make such studies and investigations as he deemed necessary or proper to assist him in prescribing any regulation or order or in the administration or enforcement of the act and regulations. And he possessed the power to subpoena a person to testify or produce records. The immunity provision of Section 202 (g) was inserted to insure a full exercise of these powers

Court regarded the question as being, "Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution?" 222 U. S. at 142. The contention was rejected notwithstanding the unqualified language of the immunity clause, because the Congressional purpose to compel the giving of truthful information would otherwise be frustrated.

unhampered by the assertion of the privilege against self-incrimination. Whenever information is sought which is protected by the Fifth Amendment and the privilege is claimed, immunity is exchanged for privileged facts. Thus, for example, the immunity provision reaches compelled oral testimony (see *United States v. Armour and Co.*, 64 F. Supp. 855 (E. D. Pa.)), or the compelled disclosure of records which are not required by law to be kept. Cf. *Wilson v. United States*, *supra*, at pp. 384-385. Thus, in some cases, persons from whom information is sought may not be subject to a regulation requiring described records to be kept. This was particularly so in the earlier stages of price control when controls were being planned, and it was essential to ascertain vital facts as a foundation for shaping the necessary controls. Even thereafter, not all business records were required records. Once the Administrator compelled the disclosure of private records, there was a flow of immunity in return.

Along these same lines, the court below emphasizes (R. 126-127) an additional factor which suggests the unreasonableness of the position for which petitioner contends:

* * * It has now been made clear by authoritative rulings that the administrative agencies have no power to secure the documents, even though required by law, through the process of a general search and seizure of a custodian's premises, but may

obtain them only, if consent is not given, by a subpoena.²² This was so held in *Bowles v. Beatrice Creamery Co.*, 10 Cir., 146 F. 2d 774, which was cited and followed in both Judge L. Hand's and Judge Frank's opinions in *United States v. Davis*, 2 Cir., 151 F. 2d 140; and these views, in turn, were approved by Mr. Justice Frankfurter for the dissenting justices in *Davis v. United States*, 66 S. Ct. 1256, and were not questioned by the majority. Indeed, the subpoena is the only remedy stated in the statute itself, §§ 202 (b) and (c). Hence here the price officials were taking the statutory course and the only legal course, against a refusal or the qualified refusal represented by the claim of immunity. To hold that the power to subpoena is subject to a grant of immunity from prosecution would thus destroy the only sure method by which the agencies may inspect the recorded in their enforcement duties. Such a holding would destroy the value of record-keeping requirements—which are unquestionably valid, *United States v. Sullivan*, 274 U. S. 259—by making their use dependent upon the waiver by suspected wrongdoers of the privilege against self-incrimination. We cannot ascribe to Congress so capricious a grant of an important regulatory power.

²² But see *G. H. Love Inc. v. Fleming*, 161 F. 2d 726 (C. C. A. 9), pending upon petition for a writ of certiorari, No. 238.

Neither the *Hoffman* decision nor petitioner's arguments suggest any plausible reason why Congress should have granted immunity for information which was not privileged. The language of Section 202 (g) more than points in the other direction. And, as this Court recognized in the *Heike* case, the language of the Compulsory Testimony Act does not compel the conclusion that Congress granted a "gratuity to crime." When, in addition to the words of the statutes, consideration is given, as it should be, to the legislative purpose, it becomes apparent, we believe, that to accept petitioner's view is to frustrate the legislative will and unnecessarily hamper the administration and enforcement of important statutes. It would excuse wrongdoing without obtaining in return any benefit.

III

IN ANY EVENT, EVEN IF PETITIONER OBTAINED SUCH IMMUNITY, IT DID NOT BAR THE PRESENT PROSECUTION, IN VIEW OF THE REMOTENESS OF THE INFORMATION CONTAINED IN THE RECORDS TO THE OFFENSES WITH WHICH PETITIONER WAS HERE CHARGED

The foregoing discussion has proceeded on the assumption, *arguendo*, that the books and records which petitioner was compelled to disclose concerned the illegal transactions for which petitioner was convicted. See fn. 2, *supra*, p. 10. But in

fact the offenses for which petitioner was convicted occurred in 1943, approximately a year prior to the sales to which the subpoenaed documents relate. As we have shown in the Statement, *supra*, p. 4, petitioner was required to produce his sales records for the month of September 1944. None of the offenses of which he was convicted relates to sales in this period. Petitioner alleges, however, that the Government's examination of his sales records for September 1944 yielded a lead which ultimately revealed the offenses in 1943 for which he was convicted. He asserts that among the sales records disclosed in response to the subpoena were records of sales to one D'Avino (see R. 99-103). By securing this customer's name, it is alleged the Government was enabled to contact him and secure information concerning other transactions prior and subsequent to the period covered by the subpoena. These allegations, which the Government did not dispute, were contained in petitioner's plea in bar (R. 31-35).

The pertinent language of the Compulsory Testimony Act (*infra*, p. 46) is that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence * * *." This Court has said that "When the statute speaks of testimony concerning a matter it means

concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike v. United States*, 227 U. S. 121, 144.

When petitioner complied with the subpoena and produced his sales records for September 1944, he did not furnish evidence concerning the 1943 offenses. None of the records in any way disclosed or tended to disclose those crimes or even that petitioner did business with D'Avino in 1943. The fact that the subpoenaed records indicated that D'Avino was a customer of petitioner's in September 1944 is not, we submit, evidence in a "substantial way" concerning the transactions in 1943 for which petitioner has been convicted. The information undoubtedly would not have been regarded as incriminating if it had been sought from petitioner as a witness in a judicial proceeding. For it did not reveal any ingredient of the 1943 offenses. Cf. *Mason v. United States*, 244 U. S. 362; *United States v. Weinberg*, 65 F. 2d 394 (C. C. A. 2).

The fact that D'Avino did business with petitioner in September 1944 was information of easy knowledge. So far as the record indicates, the business relationship between petitioner and D'Avino was open and well known. D'Avino regularly came to petitioner's place of business to purchase fruits and vegetables (see R. 43-46,

64). Anyone who was interested in knowing who petitioner's customers were need only have observed them coming to or leaving from petitioner's place of business. The fact that D'Avino bought fruits and vegetables from petitioner was not private information. It was not a fact which petitioner sought to or could keep secret.

To argue, as petitioner does, that the incidental revelation that D'Avino was his customer in September 1944, is so incriminating that he is entitled to immunity is to seek immunity for something much less than information in a "substantial way" concerning the offenses for which petitioner was convicted.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

✓ PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

✓ PHILIP ELMAN,
Special Assistant to the Attorney General.

✓ ROBERT S. ERDAHL,

✓ IRVING S. SHAPIRO,
Attorneys.

OCTOBER 1947.

APPENDIX

1. The Fifth Amendment provides in pertinent part:

No person * * * shall be compelled in a criminal case to be a witness against himself, * * *

2. Section 202 of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C., App. Supp. V, 922, provides:

(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings,¹ and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the

¹ The specific power to conduct hearings and the provisions of subsection (i) were added to the section by Section 105 of the Stabilization Extension Act of 1944, 58 Stat. 637. See H. Rep. No. 1698, 78th Cong., 2d sess.

inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to

any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.

3. The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. 46, provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or

proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and seventy-seven, or of any Amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

4. Maximum Price Regulation 426, issued July 10, 1943, 8 Fed. Reg. 9546, provided:

Sec. 11. Evasion. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any

other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise.

* * * * *

Sec. 14. *Records.* (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities.

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1947.

William Shapiro, Petitioner, } On Writ of Certiorari to
v. } the United States Cir-
The United States. } cuit Court of Appeals
for the Second Circuit.

[June 21, 1948.]

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Petitioner was tried on charges of having made tie-in sales in violation of regulations under the Emergency Price Control Act.¹ A plea in bar, claiming immunity from prosecution based on § 202 (g)² of the Act, was overruled by the trial judge; judgment of conviction followed and was affirmed on appeal. A contrary conclusion was reached by the district judge in *United States v. Hoffman*, *post p.* —. Because this conflict involves an important question of statutory construction, these cases were brought here and heard together. Additional minor considerations involved in the *Hoffman* case are dealt with in a separate opinion.

¹ 56 Stat. 23, as amended, 50 U. S. C. App. (Supp. V, 1946) § 901.

² "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of 1893 provides: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena. . . ."

2 ○ SHAPIRO v. UNITED STATES.

The petitioner, a wholesaler of fruit and produce, on September 29, 1944, was served with a *subpoena duces tecum* and *ad testificandum* issued, by the Price Administrator, under authority of the Emergency Price Control Act. The subpoena directed petitioner to appear before designated enforcement attorneys of the Office of Price Administration and to produce "all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1st, 1944, to September 28, 1944." In compliance with the subpoena, petitioner appeared and, after being sworn, was requested to turn over the subpoenaed records. Petitioner's counsel inquired whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records." The presiding official stated that the "witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to M. P. R.'s 271 and 426."³ Petitioner thereupon produced the records, but claimed constitutional privilege.

³ Section 14 of Maximum Price Regulation 426, 8 Fed. Reg. 9546 (1943) provides:

"Records. (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

"(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

The plea in bar alleged that the name of the purchaser in the transactions involved in the information appeared in the subpoenaed sales invoices and other similar documents. And it was alleged that the Office of Price Administration had used the name and other unspecified leads obtained from these documents to search out evidence of the violations, which had occurred in the preceding year.

The Circuit Court of Appeals ruled that the records which petitioner was compelled to produce were records required to be kept by a valid regulation under the Price Control Act; that thereby they became public documents, as to which no constitutional privilege against self-incrimination attaches; that accordingly the immunity of § 202 (g) did not extend to the production of these records and the plea in bar was properly overruled by the trial court. 159 F.2d 890.

It should be observed at the outset that the decision in the instant case turns on the construction of a compulsory testimony-immunity provision which incorporates by reference the Compulsory Testimony Act of 1893. This provision, in conjunction with broad record-keeping requirements, has been included not merely in a temporary wartime measure but also, in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.*

*Some of the statutes which include such provisions, applicable to the records of non-corporate as well as corporate business enterprises, are listed below:

Shipping Act, 1916 [46 U. S. C. §§ 826, 827, 814, 817, 820].

Packers and Stockyards Act, 1921 [7 U. S. C. §§ 221, 222].

Commodity Exchange Act of 1922 [7 U. S. C. §§ 15, 6, 7a].

Perishable Agricultural Commodities Act, 1930 [7 U. S. C. § 499m, 499i].

Communications Act of 1934 [47 U. S. C. §§ 409, 203, 211, 213 (f), 220, 412].

Securities Exchange Act of 1934 [15 U. S. C. §§ 78q, 78u].

Federal Alcohol Administration Act, 1935 [27 U. S. C. §§ 202 (c),

It is contended that a broader construction of the scope of the immunity provision than that approved by the Circuit Court of Appeals would be more consistent with the congressional aim, in conferring investigatory powers upon the Administrator, to secure prompt disclosure of books and records of the private enterprises subjected

204 (d); 26 U. S. C. § 2857; 15 U. S. C. §§ 49, 50].

Federal Power Act, 1935 [16 U. S. C. §§ 825 (a), 825f (g)].

Industrial Alcohol Act of 1935 [26 U. S. C. §§ 3119, 3121 (c)].

Motor Carrier Act of 1935 [49 U. S. C. §§ 305 (d), 304 (a) (1), 311 (d), 317, 318, 320, 322 (g)].

National Labor Relations Act, 1935 [29 U. S. C. §§ 156, 161].

Social Security Act, 1935 [42 U. S. C. § 405 (a), (d), (e), (f)].

Merchant Marine Act, 1936 [46 U. S. C. §§ 1124, 1211, 1114 (b)].

Bituminous Coal Act of 1937 [15 U. S. C. (1940 ed.) §§ 838, 833 (a), (e), (k), 840 (terminated, as provided in § 849)].

Civil Aeronautics Act of 1938 [49 U. S. C. §§ 644, 483, 487, 492, 622 (e) and (g), 673].

Fair Labor Standards Act of 1938 [29 U. S. C. §§ 209, 211; 15 U. S. C. §§ 49, 50].

Natural Gas Act, 1938 [15 U. S. C. § 717a, g, m].

Railroad Unemployment Insurance Act, 1938 [45 U. S. C. §§ 362 (a), (b), (c), (l), 359].

Water Carriers Act of 1940 [49 U. S. C. §§ 916, 906, 913, 917 (d)].

Freight Forwarders Act, 1942 [49 U. S. C. §§ 1017 (a), (b), (d), 1005, 1012, 1021 (d)].

In addition to the Price Control Act, the other major regulatory statutes enacted in response to the recent wartime exigencies also contain these provisions:

Second War Powers Act [50 U. S. C. App. (Supp. V, 1946) §§ 633, subsecs. 2 (a) (3), (4)].

Stabilization Act of 1942 [50 U. S. C. App. (Supp. V, 1946) §§ 967 (b), 962].

War and Defense Contract Acts [50 U. S. C. App. (Supp. V, 1946) § 1152 (a) (3), (4)].

War Labor Disputes Act [50 U. S. C. App. (Supp. V, 1946) § 1507 (a) (3), (b)].

Very recent regulatory statutes, whose construction may also be affected or determined by the ruling of the Court in the present case, include:

to OPA regulations. In support of this contention, it is urged that the language and legislative history of the Act indicate nothing more than that § 202 was included for the purpose of "obtaining information" and that nothing in that history throws any light upon the scope of the immunity afforded by subsection (g). We cannot agree with these contentions. For, the language of the statute and its legislative history, viewed against the background of settled judicial construction of the immunity provision, indicate that Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator.

The very language of § 202 (a) discloses that the record-keeping and inspection requirements were designed not merely to "obtain information" for assistance in prescribing regulations or orders under the statute, but also to aid "in the administration and *enforcement* of this Act and regulations, orders, and price schedules thereunder."⁵

The legislative history of § 202 casts even stronger light on the meaning of the words used in that section. "On July 30, 1941, the President of the United States, in a message to Congress, requested price-control legislation conferring effective authority to curb evasion and bootlegging."⁶ Two days later the Price Control Bill was intro-

Atomic Energy Act of 1946 [42 U. S. C. A. §§ 1812 (a) (3), 1810 (c) (Supp. 1947)].

⁵ Labor Management Relations Act of 1947 [Pub. L. No. 101, 80th Cong., 1st Sess., § 101, subsecs. 11, 6; § 207 (c) (June 23, 1947)].

⁶ Italics have been added here and in all other quotations in which they appear, unless otherwise noted.

⁷ "... the existing authority over prices is indirect and circumscribed and operates through measures which are not appropriate or

duced in the House by Representative Steagall, and referred to the Committee on Banking and Currency.

As introduced, and as reported out of the Committee on November 7, 1941, the bill included broad investigatory, record-keeping, licensing, and other enforcement powers to be exercised by the Administrator.¹ While it was before the House, Representative Wolcott on Novem-

applicable in all circumstances. It has further been weakened by those who purport to recognize need for price stabilization yet challenge the existence of any effective power. In some cases, moreover, there has been evasion and bootlegging; in other cases the Office of Price Administration and Civilian Supply has been openly defied.

"Faced now with the prospect of inflationary price advances, legislative action can no longer prudently be postponed. Our national safety demands that we take steps at once to extend, clarify, and strengthen the authority of the Government to act in the interest of the general welfare." Doc. No. 332, 77th Cong., 1st Sess. 3 (1941).

¹ See 87 Cong. Rec. 9148 (1941) for the precise wording of § 202, which was then numbered § 211.

The full text of § 202 as enacted is as follows:

"(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person

ber 28, 1941, offered as a substitute for § 201 a series of amendments, one of which authorized the Administrator "to subpoena documents and witnesses for the purpose of obtaining information in respect to the establishment

to appear and testify or to appear and produce documents, or both, at any designated place.

"(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

"(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U. S. C., Supp. V, § 922.

of price ceilings, and a review of price ceilings." This amendment was adopted. Thereupon Representative Wolcott moved to strike out as "redundant" the much broader and far more rigorous provisions in the bill (§ 202), which authorized the Administrator to "require the making and keeping of records and other documents and making of reports," and to "obtain or require the furnishing of such information under oath or affirmation or otherwise, as he deems necessary or proper to assist him in prescribing any regulation or order under this act, and in the administration and enforcement of the act, and regulations and orders thereunder." This amendment too was accepted by the House.¹⁰

It is significant to note that the Senate Committee on Banking and Currency began its consideration of the bill on December 9, 1941, the day after Congress declared the existence of a state of war between this country and the Imperial Government of Japan. Appearing before the Senate Committee in this wartime setting, the proponents of the original measure requested and secured the restoration of the enforcement powers which the House had stricken.¹¹ They asserted that a major aspect of the investigatory powers contained in the bill as originally drafted was to enable the Administrator to ferret out violations and enforce the law against the

⁸ 87 Cong. Rec. at 9232; see also *id.* at 9226.

⁹ *Id.* at 9231.

¹⁰ *Id.* at 9233.

¹¹ As pointed out by the Senate Committee, "... in amending the House bill, the committee has sought to strengthen it. That bill, when we were not actually at war, might have sufficed. If the authority granted had proved inadequate, additional powers might have been sought and there might have been time to do so. But the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent" S. Rep. No. 931, 77th Cong., 2d Sess. 3 (Jan. 2, 1942).

violators.¹² And it was pointed out that in striking down the authority originally given the Administrator in the committee bill to require the maintenance of records, the House had substantially stripped him of his investigatory and enforcement powers,

"because no investigatory power can be effective without the right to insist upon the maintenance of records. By the simple device of failing to keep records of pertinent transactions, or by destroying or falsifying such records, a person may violate the Act with impunity and little fear of detection. Especially is this true in the case of price-control legislation, which operates on many diverse industries and commodities; each industry having its own trade practices and methods of operation.

"The House bill also deprives the Administrator of the power to require reports and to make inspections and to copy documents. By this deprivation the Administrator's supervision over the operation of the act is rendered most difficult. He has no expeditious way of checking on compliance. He is left without ready power to discover violations.

"It should not be forgotten that the statute to be administered is an emergency statute. To put teeth into the Price Control Act, it is imperative that the Administrator's investigatory powers be strong, clear, and well adapted to the objective . . . ¹³

¹² *Hearings before the Senate Committee on Banking and Currency on H. R. 5998, 77th Cong., 1st Sess. 192 (1941)* (the reference is contained in a brief filed with the Committee by the General Counsel of the Office of Price Administration).

¹³ *Id.* at 193.

It is apparently conceded that the written statement presented to the Senate Committee by the General Counsel of the OPA in its hearings sets forth the construction that this Court sustains in affirming the judgment of the Circuit Court of Appeals for the Second

Emphasis was placed on the restoration of licensing provisions, which the House had deleted from the Price Control Bill as originally drafted. The General Counsel for the OPA contended that licensing was the backbone of enforcement of price schedules and regulations.¹⁴ The World War I prototype of the Price Control Act, the Lever Act, had contained authority for the President to license the distribution of any necessities whenever deemed essential "in order to carry into effect any of the purposes of this Act"¹⁵ It was pointed out that "The general licensing regulations prescribed under the Lever Act, applicable to all licensees, required the making of reports (rule 1), the permitting of inspection (rule 2), and the keeping of records (rule 3)."¹⁶ And it was noted that licensing had been employed in connection with the fuel provisions of the Act "as a method

Circuit in this case. We may accord to the construction expounded during the course of the hearings at least that weight which this Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions which it interprets. And we may treat those contemporaneous expressions of opinion as "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such, they are entitled to serious consideration . . ." *White v. Winchester Club*, 315 U. S. 32, 41 (1942). See also *United States v. American Trucking Assn., Inc.*, 310 U. S. 534, 549 (1940); *Hasset v. Welch*, 303 U. S. 303, 310-311 (1939).

¹⁴ *Hearings*, *supra* note 12, at 181; see also *id.* at 154, 179-80 (oral testimony), 190-200; 88 Cong. Rec. 61, 693-94 (1942); S. Rep. No. 931, 77th Cong., 2d Sess. 8-9, 19 (1942).

¹⁵ Section 5, 40 Stat. 277 (1917). Although § 4 of the Lever Act, making it unlawful for any person to charge any "unjust or unreasonable rate or charge" for handling or dealing in necessities, was held unconstitutional because of lack of an ascertainable standard of guilt in *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921), the validity of the licensing and record-keeping provisions was not challenged.

¹⁶ *Hearings*, *supra* note 12, at 183; see also *id.* at 154.

of obtaining information, of insuring universal compliance, and of enforcing refunds of overcharges and the payment of penalty charges to war charities." "By licensing middlemen, "Violations were readily discovered by examination of the records which each licensee was required to submit." ¹⁸

With this background, Congress restored licensing powers to the Administrator in the Price Control Bill as

¹⁷ *Id.* at 184.

The Report of the Senate Committee, following these hearings, recognized the key importance of licensing provisions for effective enforcement of the statute, noting that the "broad licensing power" which had been given to the Food Administrator under the Lever Act "was extensively and effectively used." The Report specifically referred also to the experience of the Fuel Administration, which at first lacked the power to license, then discovered the need for the power, and after acquiring it, secured "highly effective" enforcement results. The Report concluded that "... where there are many sellers, as in retailing for example, it is impossible to determine who is subject to control, much less enforce price regulations, without licensing. Of these facts industry is fully aware. Licensing provides a simple and direct control over violators. . . ." S. Rep. No. 931, 77th Cong., 2d Sess. 8-9.

Speaking critically of the Conference Report, Representative Gifford, who was a Manager on the part of the House and had refused to sign the Report and the Statement by the Managers, described licensing then in practice in Canada as a parallel to the licensing proposed by the amended Bill. He called the attention of the House to the Canadian statement of policy: "These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which to make speedy checks on available stocks and to police more effectively any price-fixing order which may be instituted." 88 Cong. Rec. 672 (1942). (Rep. Gifford quoted the statement from "a compiled brief on the licensing methods;" it appears, together with other data referred to by Rep. Gifford, in the section on licensing methods in the brief presented during the Senate hearings by the General Counsel of the OPA, cited *supra* note 12, at p. 188.)

¹⁸ *Hearings, supra* note 12, at 184.

¹⁹ In asking unanimous consent for the Committee to file its report on the next day, Senator Barkley, the Majority Leader and a member

enacted, § 205, 50 U. S. C. A. App. § 925 (f), and provided for the suspension by court action of the license of any person found to have violated any of the provisions of the license or price schedules or other requirements. Non-retail fruit dealers, including petitioner in the present case, were licensed under § 9a of Maximum Price Regulation No. 426, 8 F. R. 16411 (1943).

It is difficult to believe that Congress, whose attention was invited by the proponents of the Price Control Act to the vital importance of the licensing, record-keeping and inspection provisions in aiding effective enforcement of the Lever Act, could possibly have intended § 202 (g) to proffer a "gratuity to crime" by granting immunity to custodians of non-privileged records. Nor it is easy to conceive that Congress could have intended private privilege to attach to records whose keeping it authorized the Administrator to require on the express supposition that it was thereby inserting "teeth" into the Price Control Act since the Administrator, *by the use of such records*, could readily discover violations, check on compliance,

of the Committee, stated on the floor of the Senate on January 2, 1942, that these "hearings [held before the Senate Committee from December 9-17] have been in print for a week or two." 87 Cong. Rec. 10142. The Senate vote approving the House Bill as amended was not taken until January 10, more than two weeks after the hearings appeared in printed form. 88 Cong. Rec. 242. The House agreed to the Conference Report on January 26. *Id.* at 689. The Senate accepted the Conference Report on January 27. *Id.* at 725. And the Bill was approved and signed by the President on January 30. *Id.* at 911.

It is also of some interest to note the statement, contained in the Senate Report on the Bill, that a subcommittee which had been appointed immediately after the conclusion of the December 9-17 hearings "*extensively revised and strengthened the House bill in the light of the hearings and the onslaught of war.*" S. Rep. No. 931, 77th Cong., 2d Sess. 6 (Jan. 2, 1942). We assume that this record of the Senate Committee proceedings merits the same presumption of regularity as the record of a county criminal court. *Cf. Foster v. Illinois*, 332 U. S. 134, 138 (1947).

and prevent violations from being committed "with impunity."

In conformance with these views, the bill as passed by Congress empowered the Administrator to require the making and keeping of records by all persons subject to the statute; and to compel, by legal process, oral testimony of witnesses and the production of documents deemed necessary in the administration and enforcement of the statute and regulations.²⁰ It also included the immunity proviso, subsection (g) of § 202, as to which no special attention seems to have been paid in the debates, although it was undoubtedly included, as it had been in other statutes, as a "usual administrative provision,"²¹ intended to fulfill the purpose customarily fulfilled by such a provision.

The inescapable implications of the legislative history related above concerning the other subsections of § 202 would appear to be that Congress did not intend the scope of the statutory immunity to be so broad as to confer a bonus for the production of information otherwise obtainable.

Moreover, there is a presumption that Congress, in re-enacting the immunity provision of the 1893 Act, was aware of the settled judicial construction of the statutory immunity. In adopting the language used in the earlier act, Congress "must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment."²² That judicial construction is made up of the doctrines enunciated by this Court in spelling out the non-privileged status of records validly required by law to be kept, in *Wilson v. United States*, 221 U. S. 361 (1911), and the inapplicability of

²⁰ See *Joint Hearings on S. 2475 and H. R. 7200* (Fair Labor Standards Act), 75th Cong., 1st Sess. 61 (1937).

²¹ *Hecht v. Malley*, 265 U. S. 144, 153 (1924); see also *Missouri v. Ross*, 299 U. S. 72, 75 (1936); *Sessions v. Romadka*, 145 U. S. 29, 42 (1892).

immunity provisions to non-privileged documents, in *Heike v. United States*, 227 U. S. 131 (1914).

In the former case, Wilson, the president of a corporation, was required by subpoena to produce the corporate books in his custody before a grand jury. He appeared before the grand jury but refused to deliver up the records on the ground that their contents would tend to incriminate him, and claimed privilege under the Fifth Amendment. On review in this Court of the judgment committing him for contempt, Wilson based his defense in part on the theory that he would have been protected in his constitutional privilege against self-incrimination had he been sworn as a witness, and that the government's failure to permit him to be sworn could not deprive him of such protection.²² This argument was disposed of by the Court simply on the ground that a corporate officer has no such constitutional privilege as to corporate records in his possession, even though they contain entries made by himself which disclose his crime. Mr. Justice Hughes, announcing the opinion of the Court, based the decision on the reasoning (which this Court recently cited with approval, in *Davis v. United States*, 328 U. S. 582, 589-90 [1946]), that

"the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that

²² See digest of brief for appellant in *Wilson v. United States*, 55 L. Ed. 771, 773 (1911).

*there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."*²³

As illustrations of documents meeting this "required records" test, the Court cited with approval state supreme court decisions that business records kept under requirement of law by private individuals in unincorporated enterprises were "public documents which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." ²⁴ The non-corporate records treated as

²³ *Wilson v. United States*, 221 U. S. 361, 380 (1911). Holmes, J., in *Heike v. United States*, 227 U. S. 131, 143 (1913), emphasized that the decision in *Wilson* went "upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case."

²⁴ *Wilson*, *supra* note 23, at 381. In a later decision involving the alleged ability of corporate officers to assert constitutional privilege in relation to records required to be kept under a regulatory statute, Hughes, J., speaking for the Court, further spelled out the implications of the *Wilson* case and of the "required records" doctrine:

"... the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation, and cannot claim a personal privilege in hostility to the requirement." *Baltimore & O. R. Co. v. I. C. C.*, 221 U. S. 612, 622-23 (1911).

Thus the significant element in determining the absence of constitutional privilege was the fact that the records in question had been validly required to be kept to enable the Commission "properly to perform its duty to enforce the law." *Id.* at 622. The fact that the individuals claiming the privilege were corporate officers was significant only in that the business transactions subject to the Interstate Commerce Act and the records required to be kept were corporate. And, as corporate officers, they were bound by the obligation imposed

public in those cases concerned such individuals as druggists required by statute to keep a record of all sales of intoxicating liquors.²² The corporate and non-corporate businesses required by the Price Control Act to keep records embrace a much greater number of enterprises than those similarly regulated by the states and municipalities. But, since it is conceded that the increased scope of regulation under the wartime measure here involved does not render that Act unconstitutional, the required records doctrine which this Court approved as applied to non-corporate businessmen in the state cases would appear equally applicable in the case at bar.

In the *Heike* case, this Court, per Holmes, J., laid down a standard for the construction of statutory immunity provisos which clearly requires affirmance of the decision of the circuit court here: "... the obvious pur-

by the statute upon their corporation to keep the record." In other words, they were deemed custodians of the records for the Interstate Commerce Commission, not merely for the corporation. Had the transactions there regulated, and the records there required, concerned an unincorporated business, Justice Hughes' rationale sustaining the absence of constitutional privilege against self-incrimination would still apply with undiminished force.

This decision was cited with approval in *United States v. Darby*, 312 U. S. 100, 125 (1941), in support of the Court's holding that it is constitutional for Congress, as a means of enforcing the valid regulations imposed by the Fair Labor Standards Act, to require an employer to keep records of wages and hours of his employees. See note 42 *infra*.

²² Other state supreme court decisions, subsequent to the *Wilson* case, similarly treat as non-privileged, records required by statute to be kept by such individuals as licensed fish dealers, *Paladini v. Superior Court*, 178 Cal. 369, 372-74, 173 Pac. 588, 590 (1918); junk dealers regulated by municipal ordinance, *St. Louis v. Baskovitz*, 273 Mo. 543; 201 S. W. 870 (1918), or by statute, *State v. Legora*, 162 Tenn. 122, 127-28; 34 S. W. 2d 1056, 1057-58 (1931), cf. *Rosenthal v. New York*, 226 U. S. 260, 268-69 (1912); dealers in raw furs, *State v. Stein*, 215 Minn. 308, 9 N. W. 2d 769 (1943); and licensed money lenders, *Financial Aid Corp. v. Wallace*, 23 N. E. 2d 472, 474, 476 (Ind., 1939).

pose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a *gratuity to crime*. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned."²² In view of the clear rationale in *Wilson*, taken together with the ruling in *Heike* as to how statutory immunity provisos should be construed, the conclusion seems inevitable that Congress must have intended the immunity proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar. Since he could assert no valid privilege as to the required records here in question, he was entitled to no immunity under the statute thus viewed.

The traditional rule that re-enactment of a statute creates a presumption of legislative adoption of previous judicial construction may properly be applied here, since the Court in *Heike* regarded the 1903 immunity statute there construed as identical, in policy and in the scope of immunity furnished, with the Compulsory Testimony Act of 1893, which has been reenacted by incorporation into the Price Control Act.

In addition, scrutiny of the precise wording of § 202 (g) of the latter statute indicates that the draftsmen of that section went to some pains to ensure that the immunity provided for would be construed by the courts as being so limited. The construction adopted in the *Heike* decision was rendered somewhat difficult because neither the Compulsory Testimony Act of 1893 nor the immunity proviso in the 1903 Act made any explicit reference to the constitutional privilege against self-incrimination; with whose scope the Court nonetheless held the immunity to be coterminous. Section 202 (g), on the

²² *Heike*, *supra* note 23, at 142.

18. SHAPIRO, v. UNITED STATES.

other hand, follows a pattern set by the Securities Act of 1933 and expressly refers to that privilege, thus apparently seeking to make it doubly certain that the courts would construe the immunity there granted as no broader than the privilege:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of Feb. 11, 1893 . . . shall apply with respect to any individual who specifically claims such privilege."

A comparison of the precise wording of § 202 (g) with the wording of immunity provisions contained in earlier statutes²⁷ readily suggests one function intended by the drafters of § 202 (g) to be performed by the additional

²⁷ See analysis of the earlier provisos in 8 Wigmore, Evidence, §11 n.9 (3d ed. 1940), and in the brief submitted by the Government in *Heike*, a digest of which appears at 227 U. S. 137. Whether the stronger wording in the Price Control Act and other recent enactments be deemed to indicate a "new legislative purpose," as the majority of the Court in *United States v. Monia*, 317 U. S. 424 (1943), ruled that it did in connection with a procedural point not involved in the present case—or be deemed nothing more than "a careful rephrasing of a conventional statutory provision," as the dissenters in *Monia*, *supra* at 446, believed, the more stringent phrasing of the Price Control Act proviso must, in either view, be regarded as strengthening the applicability of the rule of construction of the *Heike* case:

The precise holding in *Monia* was that a witness before an investigatory body need not claim his privilege as a prerequisite to earning immunity under a pre-1933 statute which offered immunity without any reference to the need for making such a claim. The majority considered the *Heike* decision inapplicable to *Monia* because the relevant terms of the immunity proviso involved in the latter case were so plain and so sharply in contrast with the wording of the enactments after 1933, which (including the Price Control Act) expressly require the assertion of the claim, that Congress could not have intended the pre-1933 statute to require a witness to assert his claim. And it was emphasized that, to construe congressional intention otherwise in those circumstances, might well result in entrap-

SHAPIRO v. UNITED STATES.

phrases expressly referring to "privilege"—viz., that of underlining the legislative intention of requiring an *exchange* of constitutional privilege for immunity, an intent which the Court had previously thought discernable even in the less obvious terms used by the drafters of the earlier statutes. Thus the immunity provisions of the Compulsory Testimony Act can be relied upon here only if the two prerequisites set forth in § 202 (g) are satisfied: (1) that the person seeking to avail himself of the immunity could actually have been excused, in the absence of this section, from complying with any of its requirements because of his constitutional privilege against self-incrimination, and (2) that the person specifically claim such privilege. Obviously if prerequisite (1) is not fulfilled, the mere fact that the person specifically claims a non-existent privilege was not intended by Congress to entitle him to the benefit of the immunity. And this is so whether the statute be construed with particular reference to its grammar, its historical genesis, or its rational function.

Petitioner does not deny that the actual existence of a genuine privilege against self-incrimination is an absolute prerequisite for the attainment of immunity under § 202 (g) by a corporate officer who has been compelled by subpoena to produce required records; and that, under the *Heike* ruling, the assertion of a claim to such a privilege in connection with records which are in fact non-privileged is unavailing to secure immunity, where the claimant is a corporate officer. But, while conceding that the statute should be so construed where corporate officials are concerned, the petitioner necessarily attributes to Congress the paradoxical intention of awarding immunity in exchange for a claim of privilege as to records of a

ment of witnesses as to testimony concededly privileged. We do not perceive such distinguishing factors in the case at bar, and accordingly consider the *Heike* rationale fully applicable here.

claimant engaged in non-corporate business, though his business is similarly subjected to governmental price control, and its required records are, under the *Wilson* rationale, similarly non-privileged.

The implausibility of any such interpretation of congressional intent is highlighted by the unquestioned fact that Congress provided for price regulations enforceable against unincorporated entrepreneurs as well as corporate industry. It is also unquestionable that Congress, to ensure that violations of the statute should not go unpunished, required records to be kept of all relevant buying and selling transactions by all individual and corporate business subject to the statute. If these aspects of congressional intention be conceded, it is most difficult to comprehend why Congress should be assumed to have differentiated *sub silentio*, for purposes of the immunity proviso, between records required to be kept by individuals and records required to be kept by corporations. Such an assumption carries with it the incongruous result that individuals forced to produce records required to be kept for the Administrator's inspection and use in enforcing the price regulations, would be given a bonus of immunity if engaged in non-corporate business, thus rendering the records of non-corporate enterprise virtually useless for enforcement purposes,²² whereas individuals disclosing the very same type of required records but engaged in corporate enterprise, would not be given that bonus. In effect, this is to say that Congress intended

²² See Judge Delehant's well-reasoned discussion, in *Bowles v. Misle*, 64 F. Supp. 835, 843 (1946), of the "public or semi-public" character of records kept by a non-corporate entrepreneur subject in his business to such governmental regulation: "... if the regulating authority may be intercepted altogether at the door of a regulated business in its quest of information touching the observance of the law and applicable regulations, its ministry must be fruitless. And it can be no more effective if, realistically viewed, the administrator's examination may be made only at a bargain which absolves the proprietor of the business from the sanctions, whether civil or criminal, by law

the immunity proviso to frustrate a major aim of its statutory requirement of record-keeping and record inspection so far as it applies to non-corporate business men, but not so far as it applies to corporate officers.²⁹

It is contended that to construe the immunity proviso as we have here is to devitalize, if not render meaningless, the phrase "any requirements"³⁰ which appears in the

provided for such violations of the regulations, and, therefore, of the law as examination may disclose.

Compare the dictum in *United States v. Mulligan*, 268 F. 893 (N. D. N. Y. 1920), that records required to be kept by an unincorporated businessman under the Lever Act were not privileged, and that information contained therein was available for use in criminal prosecutions against the record-keeper himself. Like the Price Control Act, the Lever Act contained a compulsory testimony immunity provision. § 25, 40 Stat. 285. The memorandum filed with the Senate Committee, cited *supra* note 12, at 194, specifically referred to the "well-stated" opinion in the *Mulligan* case.

²⁹ The extreme unlikelihood that such a distinction, not expressly stated anywhere in the Act, was nevertheless intended by Congress becomes even more apparent in the light of express provision in the statute, § 4 (a), making it unlawful for any person subject to the Act, whether in corporate or unincorporated business enterprise, to fail to comply with the record-keeping requirements of § 202 (b), and making it unlawful, § 205 (b), for any such person to make "any statement or entry false in any material respect in any document or report required to be kept or filed" under § 202 (b). Even in the absence of the judicial background highlighted by the rationale of the *Wilson* and *Heike* decisions, it would be difficult to imagine that records properly required to be kept by the government, for government use in the administration of a regulatory statute, with penalties of fines and imprisonment applicable against any person subject to the statute who fails to keep those records or who falsifies entries in them, could still be regarded by Congress or the public as private records concerning which the recorder may assert a privilege against self-incrimination.

³⁰ The phrase "any requirements" appears also in the immunity provision of the Atomic Energy Act of 1946, 42 U. S. C. A. § 1812 (a) (3) (Supp. 1947). There, as in the Price Control Act, some of the requirements referred to would, in the absence of the section, be excusable because of privilege—e. g., compelled oral testimony—while

opening clause of § 202 (g): "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination"

It is urged that, since § 202 includes among its requirements the furnishing of information under oath, the making and keeping of records and reports, the inspection and copying of records and other documents, and the appearing and testifying or producing of documents, the immunity provided must cover compliance with any one of these requirements. The short answer to that contention is that the immunity provided does cover compliance with any of these requirements *as to which a person would have been excused from compliance because of his privilege*, were it not for the statutory grant of immunity *in exchange for such privilege*.³¹ The express language of the proviso, as well as its historical background, readily suggests this reasonable interpretation. Even those who oppose this interpretation must and do concede that Congress had no intention of removing the excuse of privilege where the privilege is absent from the outset because the records whose production is ordered and concerning which privilege is asserted are corporate records. If this

other requirements, including the compulsory production of records which had been kept pursuant to the statute (§ 1810 [c]), would under the *Wilson* doctrine, have the same non-privileged (and hence non-immunizing) status as the sales record involved in the present case. Compare also the phraseology used in such statutes as the War and Defense Contract Acts, 50 U. S. C. App. (Supp. V, 1946) § 1152 (a) (3), (4), and Freight Forwarders Act (1942), 49 U. S. C. § 1017 (a), (b), (d).

³¹ Compare the paraphrase of § 202 (g) contained in the Committee Reports: ". . . Although no person is *excused from complying with any requirement* of this subsection *because of his privilege against self-incrimination*, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims *such privilege*." S. Rep. No. 931, 77th Cong., 2d Sess. 21; H. R. Rep. No. 1409, 77th Cong., 1st Sess. 9. (Italics added here, as elsewhere unless otherwise noted.)

concession is made, surely logic as well as history requires a similar reading of the proviso in connection with validly required non-corporate records, as to which privilege is similarly absent from the outset.

If the contention advanced against our interpretation be valid, the Court must have erred in its construction of the immunity proviso in the *Heike* case. For, the 1893 Act, 49 U. S. C. A. § 46, which it was in effect construing, provides that, "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission . . . for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted . . . for or on account of any transaction . . . concerning which he may testify, or produce evidence, documentary or otherwise . . ." Thus the immunity part of the 1893 statute extended to *any documentary* as well as oral testimony concerning which there might be a claim of privilege. And included among the documents which the immunity-seeker might be compelled to produce were records maintained by common carriers in compliance with the requirements of the Interstate Commerce Act,³² and hence obviously within the definition of public records set forth in the *Wilson* and *Heike* decisions. If the reasoning advanced against the interpretation of § 202 (g) we have proposed were valid, then it might equally well be contended that the Court in the *Heike* decision devitalized, if not rendered meaningless, the phrase, "documentary or otherwise" in the immunity section of the 1893 Act.

³² Section 6 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380, required every common carrier subject to the provisions of the statute to file with the Commission copies of its schedules and tariffs of rates, fares, and charges, and of all contracts and agreements between carriers.

Actually, neither the interpretation as applied in the *Heike* decision nor as expounded here renders meaningless any of the words in the immunity provision. In each case, the immunity proviso is set forth in conjunction with record-keeping requirements. And in each case, where the immunity provided concerns documents whose production might otherwise be excused on the ground of privilege, the documents referred to are all writings whose keeping as records has *not* been required by valid statute or regulation. Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity in return for privilege.³³

³³ It is further suggested that the presence of statutory provisions for confidential treatment, in certain limited respects, of information obtained by the Administrator is inconsistent with the views of this opinion. We find no such inconsistency in the presence of §§ 4 (c) and 202 (h), the provisions which specify the types of confidential safeguards intended.

"Section 4 (c) affords protection to those persons required to disclose information to the Administrator by making it unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, *to disclose or to use for his personal benefit, any information obtained under the bill.* Further provision for confidential treatment of such information is found in section 202 (b) [changed in Conference to § 202 (h)]. . . . Section 202 (b) gives further protection to persons furnishing information to the Administrator under the bill by directing the Administrator upon the request of the party furnishing such information, or if he deems such information confidential, *not to disclose such information unless he deems that the public interest requires such disclosure.*" S. Rep. No. 931, 77th Cong., 2d Sess. 20-21.

This is substantially the same sort of confidential treatment provided for by the Hepburn Act of 1906, 34 Stat. 594, amending the Interstate Commerce Act: "Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, *except in so far as he may be directed by the Commission or by a court or judge thereof,* shall be subject, upon conviction in any court of the United States of competent jurisdiction,

The Court in the *Heike* case was confronted with the further contention that the 1903 immunity statute, which was immediately before him, had been passed when "there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end."³⁴ In the light of the express statements in the legislative history of the Price Control Act as to the enforcement role of the investigatory powers, such an argument would hardly be tenable in the present case. Yet even in the *Heike* case where such an argument had some elements of plausibility, the Court had no difficulty in rejecting it in favor of the Government's contention that "the statute should be limited as nearly as may be by the boundaries of the constitutional privilege of which it takes the place."³⁵

to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both." 49 U. S. C. § 20(3). Numerous other statutes have incorporated almost identically worded provisions. See e. g., Motor Carrier Act of 1935, 49 U. S. C. § 322(d).

In statutes such as these, where Congress validly distinguishes required records from private papers, with respect to the availability of the required documents as evidence in criminal or other proceedings to enforce the statute for whose effectuation they are kept, nothing in logic nor historical practice requires Congress at the same time to treat the records as public in the sense that they be open at all times to scrutiny by the merely curious. See *Coleman v. United States*, 153 F. 2d 400, 402-04 (C. C. A. 6, 1946). Congress expressly foreclosed such a result in the Emergency Price Control Act, and this opinion neither requires nor permits it.

³⁴ *Heike*, *supra* note 23, at 141.

³⁵ *Id.* at 141-42. It would appear that the persuasive brief for the Government in this case, prepared with the assistance of eminent counsel, called forth a Holmesian echo.

As a final answer, an understanding of the 1893 immunity provision, based on its full historical context, should suffice to explain the limited function contemplated by Congress in incorporating that provision into the 1942 statute. The 1893 provision was enacted merely to provide an immunity sufficiently broad to be an adequate substitute for the constitutional privilege, since previous statutory provision for immunity had been found by the Court in *Counselman v. Hitchcock*, 142 U. S. 547 (1892), not to be coextensive with the privilege, thus rendering unconstitutional the statutory requirements for compulsory production of privileged documents and oral testimony.³⁶

The suggestion has been advanced that the scope of the immunity intended by Congress should be ascertained, not by reference to the judicial and legislative history considered above, but by reference to the principle expounded in *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 307 (1924), of construing a broad grant of statutory authority so as to avoid attributing to Congress "an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."

It is interesting to note that Congress, in enacting the Price Control Bill, apparently did intend to rely upon the principle of *American Tobacco* in circumstances similar to those in which that principle was originally

³⁶ See *Heike*, *supra* note 23, at 142; *Brown v. Walker*, 161 U. S. 591, 594-5 (1896); *Hale v. Henkel*, 201 U. S. 43, 67 (1906). See also the statement made in the House by Representative Wise, of the Committee on Interstate and Foreign Commerce, in presenting the bill which became the basis of the 1893 Compulsory Testimony Act: "The whole scope and effect of the act is simply to meet the decision rendered recently by the Supreme Court in the case known as 'the Councilman [*sic*] case.'" 24 Cong. Rec. 503 (1893).

applied: namely, to insure that the power of inspection or examination would not conflict with the prohibition against unreasonable searches and seizures contained in the Fourth Amendment. Senator Brown, who was chairman of the sub-committee on the Price Control Bill and one of the managers on the part of the Senate appointed to confer with the House managers on the Senate amendments, expressly stated it to be the view of the conferees that § 202 (a), which contained broad authorization to the Administrator to "obtain such information as he deems necessary or proper to assist him" in his statutory duties, was intended solely to empower the Administrator to "obtain *relevant* data to enable him properly to discharge his functions, preferably by requiring the furnishing of information under oath or affirmation or otherwise as he may determine. It is not intended, nor is any other provision of the Act intended, to confer any power of inspection or examination which might conflict with the Fourth Amendment of the Constitution of the United States. See opinion of Justice Holmes in *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 307."³⁷

It was the abuse of the subpoena power to obtain irrelevant data in the course of a "fishing expedition" with which the Court was concerned in that case. It is clear that if the Administrator sought to obtain data irrelevant to the effective administration of the statute and if his right of access was challenged on the ground that the evidence sought was "plainly incompetent or irrelevant to any lawful purpose of the Administrator,"³⁸ that objection could sustain a refusal by the district court to issue a subpoena or other writ to compel inspection. But

³⁷ 88 Cong. Rec. 700 (1942).

³⁸ *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509 (1943).

there is no indication in the legislative history that Congress intended the *American Tobacco* principle of construction to govern the immunity proviso of subsection (g), particularly since the scope of that proviso had been so well demarcated by the courts prior to its 1942 re-enactment. And it is not insignificant that the one rule of construction which this Court has, in the past, directly and expressly applied to the immunity proviso—that “It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned”²⁰—was enunciated by Mr. Justice Holmes, who gave no sign of repudiating that principle by his subsequent statements in the *American Tobacco* case.

Even if the evidence of congressional intent contained in the legislative history were less clear-cut and persuasive, and constitutional doubts more serious than they appear to us, we would still be unconvinced as to the applicability of the *American Tobacco* standard to the construction of the immunity proviso in relation to documentary evidence which is clearly and undeniably relevant, and the recording and keeping of which the Administrator has properly required in advance. For, in construing statutory immunities in such circumstances, we must heed the equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. The canon of avoidance of constitutional doubts must, like the “plain meaning” rule, give way where its application would produce a futile result, or an unreasonable result “plainly at

²⁰ *Heike, supra* note 23, at 142.

variance with the policy of the legislation as a whole."⁴⁰

In the present case, not merely does the construction put forward by the petitioner frustrate the congressional intent as manifested by the legislative history, but it also shuts out the illumination that emanates from key words and phrases in the section when considered, as above, in the context of the history of the Compulsory Testimony Act of 1893, and the construction that had been placed upon it and similar provisos, prior to its incorporation into the Price Control Act.

There remains for consideration only the question as to whether serious doubts of constitutionality are raised if the Price Control Act is thus construed. This issue was not duly raised by petitioner, and it becomes relevant, if at all, only because such doubts are now said to be present if the immunity proviso is interpreted as set forth above.

It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity.

⁴⁰ *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940); see also *Missouri, Mississippi R. Co. v. Boons*, 270 U. S. 466, 472 (1926).

"A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question." *United States v. Sullivan*, 332 U. S. 689, 693 (1948).

concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power." Accordingly, the principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."²²

²¹ Cf. *Yakus v. United States*, 321 U. S. 414, 422 (1944).

²² *Davis v. United States*, 328 U. S. 582, 589-90 (1946). See also *United States v. Darby*, 312 U. S. 100, 125 (1941) ("Since . . . Congress may require production for interstate commerce to conform to those conditions [wages and hours], it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to a legitimate end. . . ."); *Arrow Distilleries v. Alexander*, 109 F. 2d 397, 404-05 (1940); *Di Santo v. United States*, 93 F. 2d 948 (1937). Cf. *Rodgers v. United States*, 138 F. 2d 992, 995-96 (1943).

In *Boyd v. United States*, 116 U. S. 616 (1886), the Court held unconstitutional, as repugnant to the Fourth and Fifth Amendments, an 1874 revenue statute which required the defendant or claimant, on motion of the Government attorney, to produce in court his private books, invoices and papers, or else the allegations of the Government were to be taken as confessed. The document to which the statute had been applied in that case was an invoice, which the Government, as well as the defendant, treated throughout the trial and appellate proceedings as a private business record. The Government defended the constitutionality of the statute thus applied on the ground that the action was not against the claimants, but was merely a civil action in *rem* for the forfeiture of merchandise, in which action the claimants had voluntarily intervened. It argued that in a forfeiture action, private books and papers produced under

Even the dissenting Justices in the *Davis* case conceded that "there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects,"⁴³ a difference whose essence is that the latter papers, "once they have been legally obtained, are available as evi-

compulsion have no higher sanctity than other property, since the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" applies only to criminal proceedings *in personam*.

In rejecting the Government's contention, the opinion of the majority of the Court proceeded mainly upon a complex interpretation of the Fourth Amendment, taken as intertwined in its purpose and historical origins with the Fifth Amendment. Under that view, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit [i. e., a suit for a penalty or forfeiture] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-35; see also *id.* at 621 *et seq.* In other words, the majority opinion construed the prohibition of the Fourth Amendment as applying in the foregoing circumstances "to a returnable writ of seizure describing specific documents in the possession of a specific person." 8 Wigmore, Evidence 368 (3d ed. 1940); see *Hale v. Henkel*, 201 U. S. 43, 71-72 (1906).

Holding this view of the Fourth Amendment, the majority of the Court nevertheless carefully distinguished the "unreasonable search and seizure" effected by the statute before it from the "search and seizure" which Congress had provided for in revenue acts that required manufacturers to keep certain records, subject to inspection (see, e. g., Act of July 20, 1868, c. 186, §§ 19, 45, 15 Stat. 133, 143, regulating distillers and rectifiers): "... the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. . . . But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. . . ." *Id.* at 623-24.

⁴³ *Davis*, *supra* note 42, at 602.

dence." "In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of a subpoena, as authorized specifically by § 202 (b) of the statute, it was "legally obtained" and hence "available as evidence." "The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute."

"*Ibid.*

"See dissenting opinion in *Davis*, *supra* note 42, at 614 n.9. See also *Amato v. Porter*, 157 F. 2d 719 (1946); *Coleman v. United States*, 153 F. 2d 400 (1946).

"See also the rationale set forth in 8 Wigmore, Evidence § 2259c (3d ed. 1940), a section which was cited with approval by the opinion of the Court in *Davis*, *supra* note 42, at 590:

"The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime, so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to records required by law to be kept by a citizen not being a public official, *e. g.*, a druggist's report of liquor sales, or a pawnbroker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty." (Italics as in the original.)

In the view that we have taken of the case we find it unnecessary to consider the additional contention by the government that, in any event, no immunity attaches to the production of the books by the petitioner because the connection between the books and the evidence produced at the trial was too tenuous to justify the claim.

For the foregoing reasons, the judgment of the Circuit Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1947.

William Shapiro, Petitioner,	} On Writ of Certiorari to
v.	
The United States.	} court Court of Appeals for
	} the Second Circuit.

[June 21, 1948.]

MR. JUSTICE FRANKFURTER, dissenting.

The Court this day decides that when Congress prescribes for a limited Governmental purpose, enforceable by appropriate sanctions, the form in which some records are to be kept, not by corporations but by private individuals, in what in everyday language is a private and not a Governmental business, Congress thereby takes such records out of the protection of the Constitution against self-incrimination and search and seizure. Decision of constitutional issues is at times unavoidable. But in this case the Court so decides when it is not necessary. The Court makes a drastic break with the past in disregard of the settled principle of constitutional adjudication *not* to pass on a constitutional issue—and here a grave one involving basic civil liberties—if a construction that does no violence to the English language permits its avoidance. This statute clearly permits it.¹ Instead, the Court goes on the assumption that an immunity statute must be equated with the privilege, although only recently the Court attributed to Congress a gratuitous grant of immunity where concededly the

¹ "A decision could be made either way without contradicting the express words of the act, or, possibly, even any very clear implication." Holmes, C. J., in *Hooper v. Bradford*, 178 Mass. 95, 97.

Constitution did not require it, under circumstances far less persuasive than the statutory language and the policy underlying it. See *United States v. Monia*, 317 U. S. 424.

Instead of respecting "serious doubts of constitutionality" by giving what is at the least an allowable construction to the Price Control Act which legitimately avoids these doubts, the Court goes out of its way to make a far-reaching pronouncement on a provision of the Bill of Rights. In an almost cursory fashion, the Court needlessly decides that all records which Congress may require individuals to keep in the conduct of their affairs, because they fall within some regulatory power of Government, become "public records" and thereby, *ipso facto*, fall outside the protection of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

In reaching out for a constitutional adjudication, especially one of such moment, when a statutory solution avoiding it lay ready at hand, the Court has disregarded its constantly professed principle for the proper approach toward congressional legislation. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal-principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U. S. 22, 62, quoted by Mr. Justice Brandeis with supporting citations in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348, n. 8. And see, generally, for duty to avoid constitutional adjudication, *Rescue Army v. Municipal Court*, 331 U. S. 549, 568 *et seq.*

Departure from a basic canon of constitutional adjudication is singularly uncalled for in a case such as this, where the statute not only permits a construction avoiding

constitutional considerations but on fair reading requires it.

In conferring powers of investigation upon the Administrator, Congress designed to secure the promptest disclosure of the books and records of the millions of private enterprises subjected to the regulations of the Office of Price Administration. It would contradict that vital aim to attribute to Congress the conflicting purpose of hampering the free flow of knowledge contained in businessmen's books by inviting controversies regarding still undetermined claims of privilege under the Fifth Amendment, in the absence of an expression of such purpose made much more manifest than the broad language of § 202 (g) which conferred immunity for the very purpose of avoiding such controversies.

It is a poor answer to say that if the statute were eventually found to confer immunity only to the extent required for supplying an equivalent for the constitutional privilege, all records would turn out to be unprivileged or would furnish immunity, and in either case refute any excuse for withholding them. Business men are not guided by such abstractions. Obedience is not freely given to uncertain laws when they involve such sensitive matters as opening the books of business. And so, business men would have had a strong incentive to hold back their records, forcing the Administrator to compel production by judicial process. Apart from the use of opportunities for obstructive tactics that can hardly be circumvented when new legislation is tested, delays inevitable to litigation would dam up the flow of needed information. Congress sought to produce information, not litigation. See *United States v. Monia*, *supra*, at p. 428.

In the *Monia* case the Court considered that the statute, "if interpreted as the Government now desires, may well be a trap for the witness." *Id.* at 430. We need not speculate here as to potential entrapment. The record

discloses that the petitioner asked, through his attorney, whether he was "being granted immunity as to any and all matters for ~~information~~ obtained as the result of the investigation and examination of these records." On behalf of the Price Administrator, the reply was "The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs [Maximum Price Regulations] 271 and 426." Petitioner, himself, thereupon specifically claimed immunity under the statute as well as under the Constitution, and stated that under "these conditions" he produced the books and records that the subpoena sought. It seems clear that disclosure was here made, records were produced, on the petitioner's justifiable belief—based upon the advice of counsel and acquiesced in by the presiding official—that he thereby secured statutory immunity and not constitutional litigation.

There is nothing to indicate that in 1942 Congress legislated with a view to litigating the scope of the limitation of the Fifth Amendment upon its powers. To ascertain what Congress meant by § 202 (g) we would do well to begin by carefully attending to what Congress said:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, (U. S. C. 1934 ed. Title 49 Sec. 46), shall apply with respect to any individual who specifically claims such privilege." 56 Stat. 23, 30, 50 U. S. C. Supp. V, § 922.

The text must be put into its context, not merely because one provision of a statute should normally be read in relation to its fellows, but particularly so here because Congress explicitly linked subsection (g) of § 202 to "any re-

quirements under this section." Effective price control depended on unimpeded access to relevant information. To that end, § 202 authorized the Administrator to impose the "requirements" of the section, and those from whom they were exacted were under duty of compliance by subsection (e), while subsection (g) barred any excuse from compliance by a claim of privilege against self-crimination by the assurance of immunity from prosecution.²

Subsections (a), (b), (c) and (e) impose these four requirements: persons engaged in the vast range of busi-

² The entire § 202 of the Emergency Price Control Act of 1942, as amended, is as follows:

"(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

"(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such

ness subject to the Act may be required to (1) make and keep records, (2) make reports and (3) permit the inspection and copying of records and other documents; such persons as well as others may be required to (4) "appear and testify or to appear and produce documents, or both, at any designated place."³ An unconstrained reading of

person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

"(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U. S. C., Supp. V, § 922.

³ Technically there is an additional or fifth requirement—to furnish information "under oath or affirmation or otherwise"—but this requirement is really covered by the other four.

subsection (g) insured prompt compliance with all these requirements by removing any excuse based on the privilege against self-crimination.

Here the Administrator required the petitioner to "keep and make available for examination by the Office of Price Administration . . . records of the same kind as he has customarily kept" § 14 (b), MPR 426, 8 F. R. 9546. The Government contends that because the records of petitioner's own business, those that he "customarily kept," were required to be so kept by the Administrator, he was compelled to disclose their contents even though they may have incriminated him, and that he was afforded no immunity under subsection (g) because he was not disclosing what were really his records. Surely this is to devitalize the phrase "any requirements under this section" if not to render it meaningless.

The Court supports this devitalization with the "short answer" that the immunity provided does cover compliance with *any* of these requirements as to which a person would have been excused from compliance because of his constitutional privilege. The short reply is that, bearing in mind the Court's conclusions as to the scope of the constitutional privilege, only the fourth requirement appears to be thus covered. I do not wish to lay too much stress on the Court's singular interpretation of the plural "requirements." Plainly, the Court construes § 202 (g) as according immunity only to oral testimony under oath and to the production of any documents which the Administrator did not have the foresight to require to be kept.⁴

The Court thus construes the words "complying with any requirements under this section" to read "appearing

⁴ The Administrator required this petitioner to keep "records of the same kind as he has customarily kept." § 14 (b) of Maximum Price Regulation No. 426, 8 Fed. Reg. 9546. As a practical matter, therefore, the statute as construed by the Court provides immunity only for compelled oral testimony.

and testifying or producing documents other than those required to be kept pursuant to this section." Construction, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin. But there is a difference between reading what is and rewriting it. The Court here does not adhere to the text but deletes and reshapes it. Such literary freewheeling is hardly justified by the assumption that Congress would have so expressed it if it had given the matter attentive consideration.⁵ In the *Monia* case the Court, having concluded that a similar question was present, had no difficulty in answering: "It is not for us to add to the legislation that Congress pretermitted." 317 U. S. at 430.

Both logic and authority, apart from due regard for our limited function, demonstrate the wisdom of respecting the text. The reach of the immunity given by § 202 (g) is spelled out in the incorporated terms of the Compulsory Testimony Act of 1893. These provide that where, as here, documentary evidence is exacted which may tend to incriminate, he who produces it shall not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise" 27 Stat. 443, 49 U. S. C. § 46. There is of course nothing in this provision to support the finespun exegesis which the Court puts upon § 202 (g). The Government admits as much by ac-

⁵ But cf. Carroll, *Through the Looking Glass*, c. 6:

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."

knowledging that "the literal language of the Compulsory Testimony Act possibly may be so read" as to support the present claim of immunity. But it urges that nothing in the "language or legislative history" of § 202 (g) requires a broader immunity than an adjudication of the scope of the constitutional privilege would exact.*

The language yields no support for the Government's sophisticated reading adopted by the Court. Nor is there anything in the legislative history to transmute the clear import of § 202 into esoteric significance. So far as it bears upon our problem, the legislative history of the Act merely shows that § 202 in its entirety was included for the purpose of "obtaining information."† Nothing in that history throws any light upon the scope of the immunity afforded by subsection (g).‡ What is there in this silence of Congress that speaks so loudly to the Court? What are the "inescapable implications of the legislative history" that compelled its extraordinary

* See H. R. 5479, 77th Cong., 1st Sess., as introduced on August 1, 1941, in the House of Representatives and referred to the Committee on Banking and Currency, at p. 8; H. R. 5900, 77th Cong., 1st Sess., as reported out by the Committee on November 7, 1941, at p. 12 (at the conclusion of the hearings on H. R. 5479, the Committee directed its chairman to introduce this new bill representing the old bill as amended by the Committee in executive session; see H. Rep. 1409, 77th Cong., 1st Sess., p. 3); H. Rep. 1409, *supra*, at p. 9; 87 Cong. Rec. 9073, 9231; *id.* at 9232 (Wolcott amendment to strike out all of § 202 because previous amendment of the bill rendered this section for "obtaining information" redundant); *id.* at 9233 (Wolcott amendment adopted by the House); S. Rep. No. 931, 77th Cong., 2d Sess., p. 21 (H. R. 5990, as passed by the House, amended by reinstating § 202 for the purpose of "obtaining information"); and see finally the Conference Report accompanying H. R. 5990, H. Rep. 1658, 77th Cong., 2d Sess., pp. 25-26 (agreeing to § 202).

† Indeed, the only reference to the immunity provision in the legislative documents, see footnote § *supra*, consists merely of practically verbatim repetitions of the provision.

reading of this statute? Surely, the fact that the Administrator's authority to require the keeping of records and the making of reports was stricken from the bill on its original passage through the House but was eventually reinserted, merely indicates that Congress finally concluded that obtaining information was necessary for effective price regulation.*

But the Court reads into § 202 (g) the meaning that "they" put upon the record-keeping provisions that Congress thus reinserted into the bill. "They," the "general Counsel for the OPA," appeared and testified orally at the Senate Hearings⁸ and, in urging restoration of the

* The House originally struck out the entire § 202 because a previously adopted amendment had made the section "redundant." 87 Cong. Rec. 9232-9233. The previously adopted amendment had inserted a § 203 (a) which simply provided that:

"The Administrator and the Board of Administrative Review or any member or commissioner thereof may administer oaths and affirmations, may require by subpoena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place. No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 ed., title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." *Id.* at 9228.

As passed by the House, then, the bill would have authorized the Administrator to require the production of the records here in issue, but there would have been no question of their being "public" records, and petitioner would clearly have been accorded the immunity herein claimed. The House Managers yielded as to the record-keeping requirements and the reinstatement of the entire § 202, but there is no mention in their report of the provisions of subsection (g), let alone any indication that there was any difference intended in the scope of the immunity accorded by the two bills.

⁸ Hearings before the Senate Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess., at pp. 68-71, 112-23, 144-60, 174-81, 550-53.

licensing (§ 205 (f)) and record-keeping provisions, secured permission to file various briefs and documents with the Committee.¹⁰ While there is nothing in the General Counsel's oral testimony that sheds light upon our problem, it does appear from one of the exhibits filed by him that the Court has correctly determined the far-reaching construction that he had given to provisions which the House had rejected as "redundant."¹¹ But our task is to determine, as best we can, what Congress meant—not what counsel sponsoring legislation, however disinterestedly, hoped Congress would mean. If counsel's views had been orally expressed to the Committee,¹² the Committee might have given some indication of its views. But even if upon such disclosure of counsel's views the Committee had remained silent, this would hardly have furnished sufficient evidence to transmute the language that Congress actually employed to express its meaning into some other meaning.

To attribute to Congress familiarity with, let alone acceptance of, a construction solely by reason of the fact that our research reveals its presence among the 60,000-word memoranda which the Chairman of the Senate Committee permitted the General Counsel of the O. P. A. to file, is surely to defy the actualities of the legislative process. Is there the slenderest ground for assuming that members of the Committee read counsel's submission now relied upon by the Court? There is not a reference to the contentions of the O. P. A., wholly apart from that brief, in any report of a committee of either House or

¹⁰ *Id.* at 154, 175, 180-81.

¹¹ See footnote 8 *supra*.

¹² Every reference in the Court's opinion to p. 181 *et seq.* of the hearings is to the General Counsel's brief—an exhibit—, not to oral testimony.

in any utterance on the floor of either House.¹³ The fact of the matter is that the House had passed the measure before the brief, in type smaller than that of the footnotes in this opinion, appeared in a volume of hearings com-

¹³ I do not dispute either (a) that the hearings (including the brief as an exhibit thereto) were printed and available before the Senate passed the bill, or (b) that there is a possibility that a curious Senator (but not a Representative) might have read all this fine print. I mean merely to suggest (a) that in view of the times, the typography, and the length of the text, the chances are remote, and (b) that in view of the importance of the issue it is indeed a hazardous matter to attribute positive congressional meaning to such an improbable source. While it may be presumed that the Senate subcommittee revised the House bill "in the light of the hearings," all that means is that they heard what they heard—it does not mean that they read everything they might have read. It would be enough to attribute to a diligent committeeman familiarity with transcribed oral testimony of such volume as that on this bill. But cf. *id.* at 15: "Senator BARKLEY. Mr. Chairman, none of us have read the hearings in the House—or maybe a few of us have"; *id.* at 26: "Senator TAFT. I have not read the House hearings, I am ashamed to say."

On January 26, 1942, Representative Gifford stated on the floor of the House:

"But this licensing business, 'Compulsory loyalty will crack sooner than the genuine kind.' During the last World War it was loyalty by cooperation. They had licensing, yes, on food products and on fuel, but little of anything else. If the licensee was punished, it was only a slap on the wrist. If he would contribute to the Red Cross he was forgiven. I have a compiled brief on the licensing methods that I could go into at length. An hour would be necessary to properly discuss it and to recite the experiences of ours and other nations. Canada now has it. Let me read to you their statement of policy. These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which to make speedy checks on available stocks and to police more effectively any price-fixing order which may be instituted." (88 Cong. Rec. 672.)

To trace knowledge of the O. P. A. brief to a congressional reader by assuming from this statement that Representative Gifford, who

prising 560 pages (part of the three volumes of House and Senate Hearings containing 2,865 pages). The Government, in submitting to us the legislative history of the immunity provision with a view to sustaining its claims, did not pretend that the Congress was either aware of the brief or accepted the construction it proffered. The suggestion that members of a congressional committee have read, and presumptively agreed with, the views found in a memorandum allowed to be filed by a witness and printed in appendix form in the hearings on a bill, let alone that both Houses in voting for a measure adopted such views as the gloss upon the language of the Act which it would not otherwise bear, can only be made in a Pickwickian sense. It is hard to believe that even the most conscientious members of the Congress would care to be charged with underwriting views merely because they were expressed in a memorandum filed as was the O. P. A. brief, on which so much reliance is placed in the Court's opinion. If the language of a statute is to be subjected to the esoteric interpretative process that the suggested use of the O. P. A. brief implies, since it is the common

opposed the adoption of these provisions of the bill, was such a reader, and from that to attribute to Congress knowledge of what was in an exhibit to a committee hearing, is so attenuated a process of inferential reasoning as to discredit the whole paraphernalia of legislative history. That the Congress itself does not care to be charged with knowledge of all the extraneous matter for which either House has granted leave to print in the Record is apparent from the rules of the Joint Committee on Printing providing that "the same shall be published in the Appendix" and "in 6½ point type." See Cong. Rec., Dec. 11, 1947, p. A5039. There is, moreover, little basis for concluding that the Gifford "compiled brief" was the O. P. A. brief—different briefs frequently quote from the same authority. On the contrary, the O. P. A. brief hardly presented the argument that "Compulsory loyalty will crack sooner than the genuine kind," nor did it contain material demonstrating either the narrow scope or the weaknesses of World War I licensing.

practice to allow memoranda to be submitted to a committee of Congress by interests, public and private, often high-minded enough but with their own axes to grind, great encouragement will be given to the temptations of administrative officials and others to provide self-serving "proof" of congressional confirmation for their private views through incorporation of such materials. Hitherto unsuspected opportunities for assuring desired glosses upon innocent-looking legislation would thus be afforded.

We agree with the Government that Congress gave the Administrator broad powers for obtaining information as an aid to the administration and enforcement¹⁴ of the Act, and that "The immunity provision of Section 202 (g) was inserted to insure a full exercise of these powers unhampered by the assertion of the privilege against self-incrimination." Certainly. But how does it follow that Congress thereby intended *sub silentio* to effectuate this broad purpose by confining the immunity accorded within the undefined controversial scope of the Fifth Amendment? One would suppose that Congress secured its object, as this Court held in the *Monia* case, by giving

¹⁴ Putting the word "enforcement" in § 202 (a) in italics does little to solve our problem of statutory construction—for *enforcement* means enforcement. The word is hardly enervated by the extension of immunity to the person compelled to disclose his books and records. The information thus obtained might well assist the Administrator in the enforcement of the Act against the suppliers of, buyers from, or competitors of the owner of the records. As to his suppliers, the records would of course disclose compliance with maximum price regulations; as to the buyers, many regulations established maximum price on a cost-plus basis and the information obtained would be essential to proof of violation; as to the competitors, many regulations established maximum price for new sellers on the basis of their closest competitors, and here again the information obtained might well be essential to the enforcement of the Act.

immunity and so taking away contentions based on the constitutional privilege.

Plainly, it would have sufficed to dispose of the present controversy by holding that Congress granted immunity by § 202 (g) to persons who produced their own records, as were the records in this case, and not in their possession as custodians of others, even though required to be kept by § 202. To adapt the language of Mr. Justice Holmes, words have been strained by the Court more than they should be strained in order to reach a doubtful constitutional question. See *Blodgett v. Holden*, 275 U. S. 142, 148.

And so we come to the Court's facile treatment of the grave constitutional question brought into issue by its disposition of the statutory question. In the interest of clarity it is appropriate to note that the basic constitutional question concerns the scope of the Fifth Amendment, not the validity of the Price Control Act. The Court has construed the immunity afforded by § 202 (g) of the Act as co-extensive with the scope of the constitutional privilege against self-incrimination. Thus construed, the subsection is of course valid, since, by hypothesis, it affords a protection as broad as the Fifth Amendment. *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591. The vice of this construction—and the importance of the point warrants its reiteration—is precisely that it necessitates interpretation of the Constitution instead of avoiding it.¹⁵ And if the precedents mean anything this course will be followed in every future case involving a question of statutory immunity.

¹⁵ Needless to say, the constitutionality of the Fifth Amendment is not raised!

The Court hardly finds a problem in disposing of an issue far-reaching in its implications for there is involved a drastic change in the relations between the individual and the Government as hitherto conceived. The Court treats the problem as though it were almost self-evident that when records are required to be kept for some needs of Government, or to be kept in a particular form, they are legally considered governmental records and may be demanded as instruments of self-crimination.

Ready-made catch-phrases may conceal but do not solve serious constitutional problems. "Too broadly generalized conceptions are a constant source of fallacy." Holmes, J., in *Lorenzo v. Wirth*, 170 Mass. 596, 600. Here the fallacy can be traced to the rephrasing of our problem into terms "to which as lawyers the judges have become accustomed," *ibid.*; then, by treating the question as though it were the rephrased issue, the easy answer appears axiomatic and, because familiar, authoritative. Subtle question-begging is nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged; required records are non-privileged.

If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume.

The Congress began its history with such legislation. Chapter I of the Laws of the First Session of the First Congress—"An Act to regulate the Time and Manner of administering certain Oaths"—contained a provision requiring the maintenance of records by persons admin-

istering oaths to State officials. 1 Stat. 23, 24. Chapter V—"An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States"—contained a provision requiring an importer to produce the original invoice and to make a return concerning the consigned goods with the collector of the port of arrival. 1 Stat. 29, 39-40.

Every Congress since 1789 has added record-keeping and reporting requirements. Indeed, it was the plethora of such provisions that led President Roosevelt to establish the Central Statistical Board in 1933 and induced the enactment, in 1942, of the Federal Reports Act, 56 Stat. 1078. See, generally, Report of the Central Statistical Board, H. Doc. No. 27, 76th Cong., 1st Sess.; Centralization and Coordination of Federal Statistics—Report to the Committee on Appropriations of the House of Representatives, December 4, 1945; 91 Cong. Rec. A5419. On April 25, 1939, the Central Statistical Board reported that, "Since the end of 1933, the Board has reviewed in advance of dissemination more than 4,600 questionnaires and related forms and plans proposed for use by Federal agencies. The records for the past 2 years show that the Board has received forms from 52 Federal agencies and a number of temporary interdepartmental committees." See Hearings before the House Committee on Expenditure in the Executive Departments on H. R. 5917, 76th Cong., 1st Sess., at p. 32. The Board, on the basis of a comprehensive survey of the financial and other reports and returns made to 88 Federal agencies by private individuals, farms, and business concerns during the fiscal year ending June 30, 1938, informed Congress as follows:

"Counting both the administrative and the nonadministrative reports and returns, the Board's inquiry revealed that some 49,600,000 of the total during

the year were collected in accordance with statutory provisions specifically authorizing or directing the collection of reports of the types called for. Approximately 55,000,000 returns were collected by agencies in connection with their performance of functions which were specifically authorized by statutes, although the statutes did not specify the reports. In such cases the information sought was obviously necessary in carrying out required functions. Nearly 27,000,000 returns were collected by Federal agencies on report forms for each of which the legal authority was too general or too indefinite to permit its clear definition. The remaining 5,000,000 returns were made under a variety of types of legal authorities including authorizations implied in appropriations made specifically to support the collection of the reports.

"Somewhat less than half of the returns made to Federal agencies on all forms . . . were mandatory by law, in the sense that a penalty is prescribed in case of failure of the respondent to file a required report. Some of these mandatory returns are very elaborate, and as a consequence over 60 percent of the total number of answers on report forms, other than applications, were in accordance with mandatory requirements." (H. Doc. No. 27, *supra*, at 11-12.)

I do not intend by the above exposition to cast any doubt upon the constitutionality of the record-keeping or reporting provisions of the Emergency Price Control Act or, in general, upon the vast number of similar statutory requirements. Such provisions serve important and often indispensable purposes. But today's decision can hardly fail to hamper those who make and those who

execute the laws in securing the information and data necessary for the most effective and intelligent conduct of Government.

The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become "public" records in the sense that they fall outside the constitutional protection of the Fifth Amendment. The validity of such a doctrine lies in the scope of its implications. The claim touches records that may be required to be kept by federal regulatory laws, revenue measures, labor and census legislation in the conduct of business which the understanding and feeling of our people still treat as private enterprise, even though its relations to the public may call for governmental regulation, including the duty to keep designated records.

If the records in controversy here are in fact *public*, in the sense of publicly owned or governmental, records, their non-privileged status follows. See *Davis v. United States*, 328 U. S. 582, 594, 602 (dissenting opinion). No one has a private right to keep for his own use the contents of such records. But the notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs, his records cease to be his when he is accused of crime is indeed startling.

A public record is a public record. If the documents in controversy are "public records" and as such non-privileged in a prosecution under the Price Control Act, why are they not similarly public and non-privileged in any sort of legal action? There is nothing in either the Act or the Court's construction of it to qualify their "public" nature. Is there any maintainable reason why

the Fifth Amendment should be a barrier to their utilization in a prosecution under any other law if it is no barrier here? These records were, as a matter of fact, required to be kept (and hence "public") quite apart from this Act. See Int. Rev. Code § 54 (a), and Treas. Reg. 111, § 29.54-1. If an examination of the records of an individual engaged in the processing and sale of essential commodities should disclose non-essential production, for example, why cannot the records be utilized in prosecutions for violations of the priorities or selective service legislation? Cf. *Harris v. United States*, 331 U. S. 145; but cf. *Trupiano v. United States*, 334 U. S. —.

Moreover, the Government should be able to enter a man's home to examine or seize such public records, with or without a search warrant, at any time. If an individual should keep such records in his home, as millions do, instead of in his place of business, why is not his home for some purposes and in the same technical sense, a "public" library? Compare *Davis v. United States*, 328 U. S. 582, and *Harris v. United States*, *supra*, with the "well-stated" opinion in *United States v. Mulligan*, 268 F. 893; but see *Trupiano v. United States*, *supra*. This is not "a parade of horrors." If a man's records are "public" so as to deprive him of his privilege against self-crimination, their publicness inheres in them for many other situations.

Indeed, if these records are public, I can see no reason why the public should not have the same right that the Government has to peruse, if not to use, them. For, public records are "of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure." *Evanston v. Gunn*, 99 U. S. 660, 666. It would seem to follow, therefore, that these public records of persons engaged in what to the common understanding is deemed private enterprise should be generally

available for examination and not barred by the plea that the enterprise would thereby cease to be private.

Congress was guilty, perhaps, of no more than curious inconsistency when it provided in § 202 (h) of the Act for the confidential treatment of these "public" records.¹⁸ But the seeming inconsistency generally applies to information obtained by the Government pursuant to record-keeping and reporting requirements. See H. Doc. No. 27, *supra*, at pp. 26-28; 56 Stat. 1078, 1079; H. R. Rep. No. 1651, 77th Cong., 2d Sess., at pp. 4-5; ("We [the Bureau of the Census] do not even supply the Department of Justice or anybody else with that information") Hearings before the House Committee on Expenditures in the Executive Departments on H. R. 7590, 74th Cong., 1st Sess., at p. 63.

The fact of the matter, then, is that records required to be kept by law are not necessarily public in any except a word-playing sense. To determine whether such records are truly public records, i. e., not denuded of their essentially private significances, we have to take into account their custody, their subject matter, and the use sought to be made of them.

It is the part of wisdom, particularly for judges, not to be victimized by words. Records may be public records regardless of whether "a statute requires them to be kept," if "they are kept in the discharge of a public duty" either by a public officer or by persons acting under his direction. *Evanston v. Gunn, supra*. Chap-

¹⁸For the text of § 202 (h) see note 2 *supra*. H. R. 5479 as originally introduced (see note 6 *supra*) would have left it to the Administrator to determine whether the information obtained should be deemed confidential. The bill was changed by the House Committee to its final form whereby the person furnishing the information could request confidential treatment so as to give such persons "further protection." H. R. Rep. 1409, 77th Cong., 1st Sess., p. 9. "Further" meant in addition to the statutory immunity afforded by § 202 (g)! *Ibid*.

ter I of the first statute passed by Congress, *supra*, is an example of an act requiring a *public* record to be kept.

Records do not become public records, however, merely because they are required to be kept by law. Private records under such circumstances continue to be private records. Chapter V of the Acts of the First Congress, *supra*, is an example of such a *private* record required to be kept by law.

Is there, then, any foundation for the Court's assumption that *all* records required to be kept by law are public and not privileged? Reliance is placed on language in *Wilson v. United States*, 221 U. S. 361. The holding in that case has no real bearing on our problem. Wilson, the president of a corporation, in answer to a subpoena to produce, refused to surrender the corporation's books and records on the ground that their contents would tend to incriminate him. He appealed to this Court from a judgment committing him for contempt. The case was disposed of on the ground that the books were the corporation's and not "his private or personal books," that the "physical custody of incriminating documents does not of itself protect the custodian against their compulsory production," and that, therefore, "the custodian has no privilege to refuse production although their contents tend to criminate him." 221 U. S. at 378, 380, 382. The Court concluded as follows:

"The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right

to retain the corporate books against any demand of government which the corporation was bound to recognize.

"We have not overlooked the early English decisions to which our attention has been called . . . but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws. Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his official capacity in accordance with the requirements of the subpoena. None of his personal papers are subject to inspection under the writ and his action, in refusing to permit the examination of the corporate books demanded, fully warranted his commitment for contempt." (221 U. S. at 385-86.)

The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." It gives no sanction for the bold proposition that Congress can legislate private papers in the hands of their owner, and not in the hands of a custodian, out of the protection afforded by the Fifth Amendment. Even if there were language in the *Wilson* opinion in that direction, an observation taken from its context would seem to be scant justification for resolving, and needlessly, "a very grave question of constitutional law, involving the personal security and privileges and immunities of the citizen." *Boyd v. United States*, 116 U. S. 616, 618.

The conclusion reached today that *all* records required to be kept by law are *public* records cannot lean on

the *Wilson* opinion. This is the language relied upon by the Court:

"The principle [that a *custodian* has no privilege as to the documents in his *custody*] applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." (221 U. S. at 380.)

But Mr. Justice Hughes, the writer of the *Wilson* opinion went on to note that "There are abundant illustrations in the decisions" of this principle that a custodian has no privilege as to the documents in his custody just as no one has a privilege as to public or official records because they are not his private papers. He resorted to these illustrations concerning custodians because the dissenting opinion of Mr. Justice McKenna, while accepting the premise that public records were not privileged, quarreled with the Court's holding as to the absence of a custodian's privilege concerning non-public records, as follows: "As the privilege is a guaranty of personal liberty it should not be qualified by construction and a distinction based on the ownership of the books demanded as evidence is immaterial. Such distinction has not been regarded except in the case of public records, as will be exhibited by a review of the authorities." 221 U. S. at 388.

The illustrations utilized by Mr. Justice Hughes to meet this challenge raised by the dissent stand for the propositions that (a) a custodian has no privilege, and (b) public documents and records are non-privileged, but not at all on any notion that private records required to be kept by

law are "public" records. Before analyzing the eleven precedents or illustrations thus employed, it is worthy of note that the illustrations were derived from the Government's brief. It is significant that that brief, by Solicitor General Frederick W. Lehmann, well-known for his learning, contained no reference to the "required records" doctrine. On the contrary the Government cited these cases to support its argument that: "The immunity granted by the Constitution is purely personal."¹⁷

These are the "illustrations in the decisions."

(1) *Bradshaw v. Murphy*, 7 C. & P. 612, where "it was held that a vestry clerk who was called as a witness could not on the ground that it might incriminate himself object to the production of the vestry books kept under the statute, 58 George III, chapter 69, § 2." (221 U. S. at 380.)

Comment.—This is an instance where records were required to be kept by a public officer (for such, in England, was a parish vestry clerk). Clearly the clerk had no privilege as to such records since (1) they were not his; he was merely their custodian, and (2) he was a public officer.

(2) *State v. Farnum*, 73 S. C. 165, where it was held that the dispenser of the State Dispensary had to disclose to a legislative committee the official books of that State institution.

Comment.—Under South Carolina law the dispenser was an officer of the State; the books were true public records; he was their custodian.

(3) *State v. Donovan*, 10 N. D. 203, where it was held that a register of sales of intoxicating liquor kept by a druggist pursuant to a statute providing that such record "shall be open for the inspection of the public at all

¹⁷ See summary of argument for the United States, 221 U. S. at 366. The Lehmann Brief deserves reading.

reasonable times during business hours, and any person so desiring may take memoranda or copies thereof" was a public record.

Comment.—The State court construed the statute to make the druggist a public officer and, as such, the custodian of the register for the State. The court quoted authority to the effect that the register was "the property of the state, and not of the citizen, and is in no sense a private memorandum." 10 N. D. at 209. Are we to infer from the Court's opinion in this case that the books and records petitioner customarily kept were not his property but that of the United States Government, and that they "shall be open for the inspection of the public at all reasonable times during business hours, and any person may take memoranda or copies thereof"? *Ibid.* and cf. *Evanston v. Gunn, supra.*

(4) *State v. Davis*, 108 Mo. 666, where it was held that a druggist had no privilege as to the prescriptions he filled for sales of intoxicating liquor.

Comment.—Here the prescriptions were "required to be kept by law" but they constituted "public" records in the pure *Wilson* sense. The prescriptions belonged to the physicians or their patients, "and the druggist [was] merely their custodian." 108 Mo. at 671.

(5) *State v. Davis*, 69 S. E. (W. Va.) 639 (prescription-keeping case virtually identical with *State v. Davis*, 108 Mo. 666).

(6) *People v. Coombs*, 158 N. Y. 532, where it was held that a coroner had no privilege as to official inquest records, required to be filed with the county clerk, over his contention that they were private records because they were false and had been found in his own office.

Comment.—"The papers were in a public office, in the custody of a clerk who was paid by the city. On their face they were public records and intended to be used as such." 158 N. Y. at 539.

(7) *L. & N. R. Co. v. Commonwealth*, 51 S. W. (Ky.) 167, where it was held that a railroad corporation had no privilege as to a tariff sheet.

Comment.—The tariff sheet was “required by law to be publicly posted at the station, and was in fact so posted.” 51 S. W. at 167. Petitioner is not a railroad corporation and his records were not “publicly posted.”

(8) *State v. Smith*, 74 Iowa 580, where it was held that a pharmacist had no privilege as to the monthly reports of liquor sales that he had made to the county auditor pursuant to a statutory reporting requirement.

Comment.—The reports in the auditor’s office were “public records of the office, which are open to the inspection of all, and may be used in evidence in all cases between all parties, when competent, to establish any fact in issue for judicial determination.” 74 Iowa at 583–84. Petitioner’s records were in his possession and were not open for public inspection.

(9) *State v. Cummins*, 76 Iowa 133 (same as *State v. Smith, supra*).

(10) *People v. Henwood*, 123 Mich. 317 (liquor sales reporting requirement held valid).

(11) *Langdon v. People*, 133 Ill. 382, held that seizure pursuant to search warrant of official State documents unlawfully in appellant’s possession constituted reasonable search—“They were not private papers.” 133 Ill. at 398.

In summary of the authorities cited as illustrations of the principle recognized and applied by the Court in the *Wilson* case, then, it should be obvious that they neither stand for the proposition that the fact that private records are required to be kept by statute makes them public records by operation of law, nor did Mr. Justice Hughes misconstrue them in reaching the decision in the *Wilson* case.

Were there any doubt as to the point of the illustrations in the *Wilson* case, surely we could safely permit that doubt to be resolved by the *Wilson* opinion itself. After reviewing the illustrative cases, Mr. Justice Hughes observed:

"The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection," (221 U.S. 381-82.)

Evidently the dictum in the *Wilson* case and the authorities therein cited need to be bolstered for the use to which they are put in this case. We are told that "Other state supreme court decisions, subsequent to the *Wilson* case, similarly treat as non-privileged, records required by statute to be kept." These are the five instances cited:

(1) *Paladini v. Superior Court*, 178 Cal. 369, where it was held, that the statutory procedure whereby the State Market Director could compel the production of the sales records of licensed fish dealers was valid.

Comment.—The court did not hold that the records were "non-privileged;" but disposed of the contention that the statute violated the constitutional privilege against self-incrimination on the ground that "The proceeding before the state market director is not criminal in its nature, and the order compelling the petitioners to produce their books before the state market director was not in violation of the constitutional provision which prohibits a court or officer from requiring a defendant in a criminal case to furnish evidence against himself." 178

Cal. at 373. The court did dispose of the contention that the statute violated the Fourth Amendment of the United States Constitution on the ground that the records were not private. But the records here were public records because, since it was conceded that the fish belonged to the State, "They contain a record of the purchase and sale of the property of the state, by those having a qualified or conditional interest therein." *Ibid.* There is no suggestion in this case that petitioner's records were public records because his fruit and vegetables were the property of the United States Government.

(2) *St. Louis v. Baskovitz*, 273 Mo. 543, where a municipal ordinance requiring junk dealers to keep books of registry recording their purchases and providing that the books be open for inspection and examination by the police or any citizen was upheld against the contention that it violated the State constitutional provision against unreasonable searches and seizures for private purposes.

Comment.—The case was disposed of by the court's interpretation of the words "any citizen" as being limited in meaning to "one whose property has been stolen." 273 Mo. at 576. The records here were "required to be kept by statute," it is true, but the court had no occasion to, and did not, go into the question as to whether the records were "non-privileged."

(3) *State v. Legora*, 162 Tenn. 122, where a statute requiring junk dealers to keep a record of their purchases was upheld.

Comment.—A record which "shall at all times be open to the inspection of . . . any person who may desire to see the same," 162 Tenn. at 124, is, of course, a "public" record. *Evanston v. Gunn*, *supra*; cf. *St. Louis v. Baskovitz*, *supra*.

(4) *State v. Stein*, 215 Minn. 308, where a statute requiring licensed dealers in raw furs to keep records of their sales and purchases was upheld.

Comment.—The records here were public records for the same reason that the records involved in the *Paladini* case were public records—"the state is the owner, in trust for the people, of all wild animals." 215 Minn. at 311.

(5) *Financial Aid Corporation v. Wallace*, 216 Ind. 114, where a statute requiring licensed small loan concerns to keep records and providing for their inspection by the State Department of Financial Institutions was upheld.

Comment.—The court had no occasion to, and did not, go into the question as to whether the records were either "public" or "non-privileged."

It appears to me, therefore, that the authorities give no support to the broad proposition that because records are required to be kept by law they are public records and, hence, non-privileged. Private records do not thus become "public" in any critical or legally significant sense; they are merely the records of an industry or business regulated by law. Nor does the fact that the Government either may make, or has made, a license a prerequisite for the doing of business make them public in any ordinary use of the term. While Congress may in time of war, or perhaps in circumstances of economic crisis, provide for the licensing of every individual business, surely such licensing requirements do not remove the records of a man's private business from the protection afforded by the Fifth Amendment. Even the exercise of the war power is subject to the Fifth Amendment. See, e. g., *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155-56. Just as the licensing of private motor vehicles does not make them public carriers, the licensing of a man's private business, for tax or other purposes, does not under our system, at least so I had supposed, make him a public officer.

Different considerations control where the business of an enterprise is, as it were, the public's. Clearly the

records of a business licensed to sell state-owned property are public records. Cf., e. g., *Paladini v. Superior Court*, *supra*; *State v. Stein*, *supra*. And the records of a public utility, apart from the considerations relevant to corporate enterprise, may similarly be treated as public records. Cf., e. g., *L. & N. R. Co. v. Commonwealth*, *supra*; *Financial Aid Corporation v. Wallace*, *supra*. This has been extended to the records of "occupations which are *malum in se*, or so closely allied thereto, as to endanger the public health, morals, or safety." *St. Louis v. Baskovitz*, *supra*, at p. 554; cf., e. g., *State v. Legora*, *supra*; *State v. Donovan*, *supra*; *State v. Smith*, *supra*.

Here, the subject matter of petitioner's business was not such as to render it public. Surely, there is nothing inherently dangerous, immoral, or unhealthy about the sale of fruits and vegetables. Nor was there anything in his possession or control of the records to cast a cloud on his title to them. They were the records that he customarily kept. I find nothing in the Act, or in the Court's construction of the Act, that made him a public officer. He was being administered, not administering. Nor was he in any legitimate sense of the word a "custodian" of the records. I see nothing frivolous in a distinction between the records of an "unincorporated entrepreneur" and those of a corporation. On the contrary, that distinction was decisive of the *Wilson* holding:

"But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examinations of books." (221 U. S. at 382.)

And the Court quoted at length from *Hale v. Henkel*, 201 U. S. 43, 74-75:

"... we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an exam-

ination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises" (221 U. S. at 383.)

The distinction between corporate and individual enterprise is one of the deepest in our constitutional law, as it is for the shapers of public policy.

The phrase "required to be kept by law," then, is not a magic phrase by which the legislature opens the door to inroads upon the Fifth Amendment. Statutory provisions similar to § 202 (b) of this Act, requiring the keeping of records and making them available for official inspection, are constitutional means for effective administration and enforcement.¹⁸ It follows that those charged with the responsibility for such administration and enforcement may compel the disclosure of such records in conformity with the Fourth Amendment. See *Boyd v. United States*, *supra*, at pp. 623-24. But it does not follow that such disclosures are beyond the scope of the protection afforded by the Fifth Amendment. For the compulsory disclosure of a man's "private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit

¹⁸ See note 14 *supra*.

the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 632.

The Court in the *Boyd* case was fully cognizant of the sense and significance of the phrase "books required by law to be kept for their inspection." *Id.* at 623-24. Surely the result of that decision, if not the opinion itself, speaks loudly against the claim that merely by virtue of a record-keeping provision the constitutional privilege against self-incrimination becomes inoperative. The document in controversy in the *Boyd* case was historically, and as a matter of fact, much more of a "required record" than the books and records the petitioner here "customarily kept." If the Court's position today is correct the *Boyd* case was erroneously decided.¹⁹

¹⁹ The Boyds had contracted to supply plate glass to the Government on a duty-free price basis. They contended that they had fulfilled this contract out of their stock on hand. They had previously secured a free entry of 29 cases of plate glass and claimed that this shipment replaced *in part* the glass that they had furnished the Government; the Government asserted that that shipment contained more than the amount of the glass furnished. After the Boyds had secured a free permit and entry of a second shipment of 35 cases of plate glass, but before delivery to them, the goods were seized and the free permit was revoked. In the proceedings for the forfeiture of the 35 cases, the Government, pursuant to the statutory procedure held unconstitutional by the Court, sought and secured production from the Boyds of the invoice covering the first shipment of the 29 cases. This invoice was a "record required to be kept by statute." The Act of July 31, 1789, required the importer to make an official entry with the collector at the port of arrival and there produce the original invoice to the collector. 1 Stat. 29, 39-40; as amended by the Act of August 4, 1790, 1 Stat. 145, 161-62; as amended by the Act of March 2, 1799, 1 Stat. 627, 655-56 (invoice must be signed by collector; and see form of oath required to accompany invoice); as amended by the Act of April 20, 1818, 3 Stat. 433, 434, 436; as amended by the Act of March 1, 1823, 3 Stat. 729-30 (no entry without invoice unless importer gives bond to

In disregarding the spirit of that decision, the Court's opinion disregards the clarion call of the *Boyd* case: *obsta principijs*. For, while it is easy enough to see this as a petty case and while some may not consider the rule of law today announced to be fraught with unexplored significance for the great problem of reconciling individual freedom with governmental strength, the *Boyd* opinion admonishes against being so lulled. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by

secure production of invoice within stated period), 737 (invoice, certified with collector's official seal, conclusive evidence of value of imported goods in any court of the United States); as amended by the Act of August 30, 1842, 5 Stat. 548, 564-65 (collector authorized to examine any importer and to require production of invoices); as amended by the Act of March 3, 1863, 12 Stat. 737-38 (required invoices to be in triplicate and indorsed prior to shipment to this country by a consular officer who "shall deliver to the person producing the same one of said triplicates, to be used in making entry of said goods, wares, or merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of said goods, wares, or merchandise"), 740 (penalty for wilful destruction or concealment of invoices) and (district judge where it appears to his satisfaction that fraud on revenue has been committed or attempted shall authorize collector to seize invoices); as amended by the Act of June 30, 1864, 13 Stat. 202, 217-18 (invoice must be made out in the weights and measures of the country from which importation made); as amended by the Act of July 18, 1866, 14 Stat. 178, 187 (seizure of invoices); as amended by the Act of March 2, 1867, 14 Stat. 546, 547 (seizure of invoices); as amended by the Act of June 22, 1874, 18 Stat. 186, 187 (§ 5—seizure of invoices—held unconstitutional in *Boyd* case). For administrative requirements as to form, contents, filing and keeping of invoices, in effect at time of entry involved in *Boyd* case, see General Regulations under the Customs and Navigation Laws (1884) Arts. 314-34; see also Elmes, Customs (1887) c. VII.

silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Id.* at 635.

Violators should be detected, tried, convicted, and punished—but not at the cost of needlessly bringing into question constitutional rights and privileges. While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.

And so I conclude that the Court has misconstrued the Fifth Amendment by narrowing the range and scope of the protection it was intended to afford. The privilege against self-incrimination is, after all, "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*; *supra*, at p. 563. If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers "public" and non-privileged, there is little left to either the right of privacy or the constitutional privilege.

Even if there were authority for the temerarious pronouncement in today's opinion, I would insist that such authority was ill-founded and ought not to be followed. There is no such authority. The Court's opinion can gain no strength beyond itself. The persuasiveness of its opinion is not enhanced by the endeavor of the majority of the Court, so needlessly reaching out for a constitutional issue, to rest its ominous inroads upon the Fifth Amendment not on the wisdom of their determination but on blind reliance upon non-persuasive authority.

SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1947.

William Shapiro, Petitioner,	} On Writ of Certiorari to	
v.		the United States Cir-
The United States.		cuit Court of Appeals for
		the Second Circuit.

[June 21, 1948.]

MR. JUSTICE JACKSON, with whom MR. JUSTICE MURPHY agrees, dissenting.

The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice "to the limits of its logic." That it has already expanded to cover a vast area is apparent from the Court's citation of twenty-six federal statutes that present parallels to the situation here under review. It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule not merely to records specially required under the Act but also to records "customarily kept," invites and facilitates that eventuality.

The practice approved today obviously narrows the protections of the Fifth Amendment. We should not attribute to Congress such a purpose or intent unless

it used language so mandatory and unmistakable that it left no alternative, and certainly should not base that inference on "legislative history" of such dubious meaning as exists in this case. Congress, if we give its language plain and usual meaning, has guarded the immunity so scrupulously as to raise no constitutional question. But if Congress had overstepped, we should have no hesitation in holding that the Government must lose some cases rather than the people lose their immunities from compulsory self-incrimination. However, in this case, the plain language of Congress requires no such choice. It does require, in my view, that this judgment be reversed.

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[June 21, 1948.]

MR. JUSTICE RUTLEDGE, dissenting.

With reservations to be noted, I agree with the views expressed by MR. JUSTICE JACKSON, and with MR. JUSTICE FRANKFURTER's conclusions concerning the effect of the immunity provision, § 202 (g) of the Emergency Price Control Act.¹

With them I cannot accept the Court's construction of that section which reduces the statutory immunity to the scope of that afforded by the Fifth Amendment's prohibition against compulsory self-incrimination. This Court has not previously so decided.² Nor, in my judg-

¹ 56 Stat. 23, 30 [§ 202 (g)], as amended, 50 U. S. C. App. § 901, incorporating the provisions of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U. S. C. § 46, quoted in the Court's opinion in note 2.

² Neither *Heike v. United States*, 227 U. S. 131, nor *Wilson v. United States*, 221 U. S. 361, principally relied upon by the Court, approached such a ruling.

The *Wilson* case dealt only with corporate records, and the claim of a corporate officer having their custody to constitutional immunity against being required to produce them. None were required by law to be kept, in the sense that any federal law required that they be kept and produced for regulatory purposes. The only ruling was that a corporate officer has no personal immunity against producing corporate records, which are of course not his own, and that the corporation has no immunity of its own under the Fifth

ment, can the present decision be reconciled with the language of the statute or its purpose obvious on its face.

That wording compels testimony and the production of evidence, documentary or otherwise, regardless of any claim of constitutional immunity, whether valid or otherwise.³ But to avoid the constitutional prohibition and, it would seem clearly, also any delay in securing the information or evidence required the Act promises immunity "for or on account of any transaction, matter or

Amendment's guaranty. The decision is not pertinent to the presently tendered problem.

The *Heike* decision is equally not apropos. The exact ruling was that the evidence, from the production of which the claimed right of immunity, constitutional as well as statutory, arose, "did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that all were dealings of the same sugar company." 227 U. S. 131, 143. The actual ruling therefore apart from the fact that a corporate officer claimed immunity in large part for producing corporate records, see *id.*, 142-143, was that the petitioner had not brought himself within the scope of the statutory authorization, namely, that the "transaction, matter or thing" concerning which he had testified had no substantial connection with the matters involved in his prosecution. The decision is authority for nothing more than that the immunity at the most does not attach when the constitutional claim precluded, but said to bring the statute into play, is insubstantial. The dictum stressed in the Court's opinion that the statute "should be construed, so far as its words fairly allow the construction, as coterminous with" (P. 142) the constitutional immunity, not only was unnecessary, but as the clause itself emphasized explicitly negatives exact equivalence. (Emphasis added.)

³ The wording of the Compulsory Testimony Act neither requires nor suggests that the right to the immunity given should turn on the validity or invalidity of the constitutional claim which is precluded. At the least the Act would seem clearly to cover both valid and substantially doubtful ones.

thing, concerning which he may testify, or produce evidence . . . in obedience to" the subpoena.⁴

The statute thus consists of a command and a promise. In explicit terms the promise is made coextensive with the command. It expressly precludes prosecution, forfeiture or penalty "for or on account of *any* transaction, matter or thing" concerning which evidence is produced in compliance with the subpoena.⁵ Compelling testimony and giving immunity "for or on account of any transaction, matter or thing, concerning which he may testify" is very different from compelling it and promising that, when given, the person complying "shall have only the immunity given by the Fifth Amendment and no more." To constrict the statute's wording so drastically is not simply to interpret, it is to rewrite the congressional language and, in my view, its purpose. If Congress had intended only so narrow a protection, it could easily have said so without adding words to lead witnesses and others to believe more was given.

It may be, however, notwithstanding the breadth of the promissory terms, that the statutory immunity was not intended to be so broad as to cover situations where the claim of constitutional right precluded is only frivolous or insubstantial or not put forward in good faith.⁶ And if, for such a reason, the literal breadth of the wording may be somewhat cut down, restricting the statute's immunity by excluding those situations would neither

⁴ See the text of the Compulsory Testimony Act of 1893 quoted in note 2 of the Court's opinion.

⁵ The express limitation of the immunity to testimony or evidence produced in obedience to the subpoena excludes immunity for volunteered testimony or evidence, i. e., such as is given in excess of the subpoena's requirement. But the terms of the statute purport to exclude no other.

⁶ Cf. *Heike v. United States*, 227 U. S. 131. See note 2 *supra*.

restrict the effect of the statutory words to that of the Amendment itself nor give them the misleading connotation of the Court's construction. Such a construction would not be departing widely from either the statute's terms or their obvious purpose to give immunity broader than the Amendment's, and would be well within the bounds of statutory interpretation. On the other hand, the Court's reduction of the statutory wording to equivalence in effect with the constitutional immunity, nearly if not quite makes that wording redundant or meaningless; in any event, it goes so far in rewriting the statutory language as to amount to invasion of the legislative function.

Whether one or the other of the two broader views of the statute's effect is accepted, therefore, it is neither necessary nor, I think, reasonable and consistent with the statutory wording and object or with this Court's function as strictly a judicial body to go so far in reconstructing what Congress has done, as I think results from reducing the statutory immunity to equivalence with the constitutional one.

Since it is not contended that there was not full compliance with the subpoena in this case, that compliance was excessive in the presently material portions of the evidence or information produced, or that the claim of constitutional immunity precluded was frivolous, insubstantial or not made in good faith, I think the judgment should be reversed by applying the statutory immunity, whether in one or the other of the two forms which may be applied.

In this view I am relieved of the necessity of reaching the constitutional issue resulting from the Court's construction, and I express no opinion upon it except to say that I have substantial doubt of the validity of the Court's conclusion and indicate some of the reasons for this. I have none that Congress itself may require the

keeping and production of specified records, with appropriate limitations, in connection with business matters it is entitled to and does regulate. That is true not only of corporate records, *Wilson v. United States*, 221 U. S. 361, but also of individual business records under appropriate limitations and specification, as the numerous instances cited in Mr. JUSTICE FRANKFURTER's opinion illustrate.

But I seriously doubt that, consistently with the Fourth Amendment, as well as the prohibition of the Fifth against compulsory self-incrimination, Congress could enact a general law requiring all persons, individual or corporate, engaged in business subject to congressional regulation to produce, either in evidence or for an administrative agency's or official's examination, any and all records, without other limitation, kept in connection with that business. Such a command would approach too closely in effect the kind of general warrant the Fourth Amendment outlawed. That would be even more obviously true, if there were any difference, in case Congress should delegate to an administrative or executive official the power to impose so broad a prohibition.

The authority here conferred upon the Administrator by the Emergency Price Control Act, in reference to record-keeping and requiring production of records, closely approaches such a command. Congress neither itself specifies the records to be kept and produced upon the Administrator's demand nor limits his power to designate them by any restriction other than that he may require such as "he deems necessary or proper to assist him," § 202 (a), (b), (c), in carrying out his functions of investigation and prescribing regulations under, as well as of administration and enforcement of, the Act. And as the authority to specify records for keeping and production was carried out by the Administrator, the only limitation imposed was that the records should be such

as had been "customarily kept." § 14 (b), M. P. R. 426, 8 Fed. Reg. 9546, 9549. Such a restriction is little, if any, less broad than the one concerning which I have indicated doubt that Congress itself could enact consistently with the Fourth Amendment.

The authorization therefore is one which raises serious question whether, by reason of failure to make more definite specification of the records to be kept and produced, the legislation and regulations involved here do not exceed the prohibition of the Fourth Amendment against general warrants and unreasonable searches and seizures. There is a difference, of course, and often a large one, between situations where evidence is searched out and seized without warrant, and others where it is required to be produced under judicial safeguards. But I do not understand that in the latter situation its production can be required under a warrant that amounts to a general one. The Fourth Amendment stands as a barrier to judicial as well as executive or administrative excesses in this respect.

Although I seriously question whether the sum of the statute, as construed by the Court, the pertinent regulations, and their execution in this case does not go beyond constitutional limitations in the breadth of their inquiry, I express no conclusive opinion concerning this, since for me the statutory immunity applies and is sufficient to require reversal of petitioner's conviction.

